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W H I T E P A P E R

LEGISLATIVE PROPOSALS RESPECTING A REVIEW AND REVISION OF THE FAMILY LAW REFORM ACT, R.S.P.E.I. 1988 Cap. F-3

MARCH 1990

WHITE PAPER

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PURPOSE OF THE WHITE PAPER

The current Family Law Reform Act R.S.P.E.I. 1988 Cap. F-3 became law on December 31, 1978 after a period of considerable public interest and debate on the subject of family law.

Several approaches to a revised family law for this province were available as models in 1978 but the Ontario Family Law Reform Act passed in 1976 was used as the model for the Prince Edward Island legislation; our current Act is virtually identical to that act.

Application and use of the Ontario Act pointed out some major difficulties and inequities; this resulted in a major review of the 1978 Ontario Act which in turn resulted in a new Act being passed in 1986. The new Ontario Act included a number of substantive differences from the original Act among which are the following:

(1) The Ontario Family Law Reform Act, 1978, empowered the court to divide property upon separation, divorce, and annulment. The 1986 Family Law Act added the important heads of improvident depletion of assets, and death.

(2) The Ontario Family Law Reform Act, 1978 had divided the property that formed the family assets itself, and the family assets were determined according to a "use" test. The 1986 legislation reflected a fundamental change whereby property is now divided on the basis of a calculation that results in an equalization payment.

(3) Under the new Ontario 1986 legislation, a spouse's net family property must be determined in order that the equalization payment from the richer spouse be made. Because net family property under the Family Law Act, 1986, includes almost all property acquired since the date of the marriage, business assets that have come into being (or been improved or increased in value since the date of the marriage)

are subject to the net family asset calculation, and may have to be liquidated in order to allow an equalization payment to be made.

(4) The 1978 legislation devolved support obligations on spouses - that is, those who were married to each other. The 1986 Ontario Family Law Act extended the support obligation to those couples who were not married but who had cohabited continuously for a period of not less than three years. Both Acts impose a support obligation in favour of unmarried minors who have not withdrawn from parental control.

(5) The Ontario Family Law Reform Act, 1978 was characterized by a high degree of judicial discretion, notably in division of family assets (and in creation and application of the "use" test). The later Family Law Act, tempers judicial discretion by providing a more "mechanical" formula for division of the "gains" of the marriage or cohabitation.

It has become clear from judicial decisions and changing public opinions that the current Prince Edward Island legislation contains certain inequities and inadequacies which should be remedied. However, before embarking on a revision of the current Prince Edward Island statute the views of the many persons, groups and officials who have an interest in family law should be heard. This review may help to ensure that where there is a concensus in terms of changes to the current law that concensus is not ignored and new problems created in substitution for the old ones. To that end the Minister of Justice and Attorney General tables this White Paper with the purpose of inviting public discussion on possible changes to our Family Law Reform Act.

The Minister's intention is that between the date of tabling this White Paper in the Legislature and the next sitting of the Legislature, public hearings will be held by a special committee of the Legislature legislation which will invite and hear representations on the current Prince Edward Island Family Law Reform Act and its revision.

After the hearings have concluded and before the next session of the Legislature a revision of the current legislation will be drafted and may then be introduced as a bill during the 1991 sitting of the Legislature.

There have been many private opinions expressed to the Minister and many public comments made over the last several months on the topic of the Prince Edward Island Family Law Reform Act; to assist those who would wish to comment on changes to the current Prince Edward Island Family Law Reform Act extensive background materials have been prepared outlining the various family law schemes currently in use in Canada and Wester Europe and included with the background material is a draft of a possible revision of the Act.

The draft revision, it must be emphasized, is for discussion purposes only and is included to focus debate by showing possible solutions to the inequities and inadequacies in our current legislation. The draft revision does not reflect Government policy. Government policy will be established only after a review of the public's response to this White Paper.

While the draft revised Prince Edward Island Family Law Act includes a possible resolution of numerous problems found in the current legislation, debate on the issues may result in a different solution to the underlying problems or it may result in the conclusion that there is no problem and the issue does not warrant amendments.

The basic structure of the current legislation and much of its philosophy have been retained in the draft legislation but attempts to remove uncertainties in interpretation, application and enforcement have been included. The draft revision would also include the following substantial changes to the present family law in Prince Edward Island:

(1) The draft revised Prince Edward Island Family Law Act permits the court to determine any matter respecting the division of net family assets upon the application of a spouse; the draft revision would include the widow or widower in the definition of spouse and therefore empower the courts to divide assets after the death of one of the spouses. It would also allow a spouse to apply to the courts to restrict or prevent that person's spouse from wasting or improvidently depleting their assets - while they are still married and intend to remain together.

(2) The proposed Act contemplates an equal division of family assets - a term liberally defined, but with the key exclusion of business assets, and a special treatment for business assets that form part of farm property - basically providing a 1/3 interest in a farm property to a non-owning, non-registered spouse. The draft revision is, in a sense, a hybrid version of the current Prince Edward Island Family Law Reform Act and the new Ontario Family Law Act. The current Prince Edward Island Act, in distinction, views the division of property in essentially the same way the old Ontario legislation did - equal division based on a use test; the draft revision adopts several principles contained in the new Ontario Act.

(3) The draft revised Prince Edward Island Family Law Act will include a range of assets in the net family asset calculation not specifically mentioned in the existing legislation, including R.R.S.P.'s, pensions, and insurance benefits. Excluded will be bequests specifically named and certain rights or benefits that attach strictly to the person, such as personal injury damages and attendant insurance claims. The revised draft Act provides a list of such items; the current Prince Edward Island legislation left this determination, for the most part, to the courts. Greater precision and predictability of results should be achieved by these changes.

(4) Support obligations are distinguished in the proposed Act from both the current Prince Edward Island and the current Ontario legislation. Support is proposed to extend to co-habitees (

ordinarily of not less than 3 years standing), minors, and children up to 22 years of age who are unmarried, in financial need, and attending school or a post-secondary institution. This is the widest of support obligations envisioned in any of the current or previous Ontario and Prince Edward Island legislation.

(5) Judical discretion, narrowed by the 1986 Ontario legislation, is limited by the proposed Prince Edward Island legislation as well, but the great advantage of limiting discretion is certainty, and it is the intention of the draft legislation to produce a certainty grounded in fairness.

As an alternative to the current Prince Edward Island Family Law Reform Act and its draft revision, the 1986 revised Ontario legislation known as the Family Law Act, is also included in this White Paper. Its solution to the problems addressed in the draft revised Prince Edward Island Act is philosphically different in many instances from the 1978 Ontario Act and the current Prince Edward Island Act as noted earlier in relation to differences between the 1978 Ontario Family Law Reform Act and the 1986 Family Law Act (Ont.)

The new Ontario legislation offers not only an interesting and helpful alternative to the existing Prince Edward Island legislation (and the possible revision) but it also offers certain advantages: clarity and certainty in interpretation and enforcement would be greatly enhanced in this province by having available the benefits of the Ontario judicial decisions, treatise writings and various commentaries. In short, we would be able to use to our benefit the experience and knowledge of those using, applying and enforcing the Ontario Family Law Act.

The background materials enclosed with the White Paper include historical background to the development and rationale of the Prince Edward Island Family Law Reform Act, an analysis of the various family law models currently operative in Canada, an analysis of the conceptual

differences between the new Ontario and current Prince Edward Island legislation. Two concordances are included with the background materials: the first lists the section numbers of the existing Prince Edward Island Family Law Reform Act and shows what changes would be made to them in the draft revised Prince Edward Island Family Law Act; the second concordance demonstrates on a subject by subject basis where the law can be found in the statutes of Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland, Nova Scotia, Ontario, Prince Edward Island, Quebec and Saskatchewan.

The purpose of the White Paper is, therefore, to stimulate debate and to assist Government in considering what, if any, changes should be made to the current Prince Edward Island Family Law Reform Act.

PRINCE EDWARD ISLAND

CHAPTER F-3

FAMILY LAW REFORM ACT

1. In this Act

Definitions

(a) "child" means a child born within or outside marriage, an adopted child subject to sections 18 and 26 of the *Adoption Act* R.S.P.E.I. 1988, Cap. A-4 (which relate to the effect of adoption), and includes a person whom the parent has demonstrated a settled intention to treat as a child of his or her family, but does not include a child placed in a foster home by a person having lawful custody; — child

(b) "cohabit" means to live together in a conjugal relationship, whether within or outside marriage; — cohabit

(c) "court" means the Family Section of the Supreme Court; — court

(d) "domestic contract" means a domestic contract as defined in Part IV; — domestic contract

(e) "parent" means the father or mother of a child, and includes a person who has demonstrated a settled intention to treat a child as a child of his or her family, but does not include a person in whose home a child was placed as a foster child by a person having lawful custody; — parent

(f) "spouse" means either of a man and woman who — spouse

(i) are married to each other,

(ii) are married to each other by a marriage that is voidable and has not been voided by a judgment of nullity, or

(iii) have gone through a form of marriage with each other, in good faith, that is void and are cohabiting or have cohabited within the preceding year. 1978,c.6,s.2.

2. (1) Where, in an application under any provision of this Act, it appears to the court that for the appropriate determination of the affairs of the spouses it is necessary or desirable to have other matters first or simultaneously determined, the court may direct that the application stand over until such other applications are brought or determined as the court considers appropriate. — Combining of application

(2) An application under this Act may be made in the manner prescribed by the rules of court or in another proceeding. — Applications

Capacity of minors

(3) A minor who is a spouse has capacity to commence, conduct and defend a proceeding under this Act without the intervention of a next friend or litigation guardian and give any consent required or authorized by this Act.

Extension of times

(4) The court may extend the time for bringing an application under this Act where the court is satisfied that

(a) there are *prima facie* grounds for relief;

(b) relief is unavailable because of delay that has been incurred in good faith; and

(c) no substantial prejudice or hardship will result to any person affected by reason of the delay.

Closed hearings

(5) The court may exclude the public from a hearing, or any part thereof, where, in the opinion of the presiding judge, the desirability of protecting against the consequences of possible disclosure of intimate financial or personal matters outweighs the desirability of holding the hearing in public and the court may by order prohibit the publication of any matter connected with the application or given in evidence at the hearing.

Consent orders

(6) Upon the consent of the parties in an application under this Act, the court may make any order that the court is otherwise empowered to make by this Act, subject to the duty of the court to have regard to the best interests of children affected.

Incorporation of contract in order

(7) Any matter provided for in a domestic contract may be incorporated in an order made under this Act.

Act subject to contracts

(8) Where a domestic contract makes provision in respect of a matter that is provided for in this Act, the contract prevails except as otherwise provided in this Act.

Registration of orders

(9) Where an order made under this Act affects real property, the order does not affect the acquisition of an interest in the real property by a person in good faith without notice of the order, unless the order is registered in the proper land registry office. 1978,c.6,s.3.

PART I
FAMILY PROPERTY

Definitions

3. In this Part

family assets

(a) "family assets" means a matrimonial home as determined under Part III and property owned by one spouse or both spouses and ordinarily used or enjoyed by both spouses or one or more of their children while the spouses are residing together for shelter or

transportation or for household, educational, recreational, social or aesthetic purposes, and includes

(i) money in an account with a chartered bank, savings office, credit union or trust company where the account is ordinarily used for shelter or transportation or for household, educational, recreational, social and aesthetic purposes,

(ii) where property owned by a corporation, partnership or trustee would, if it were owned by a spouse, be a family asset, shares in the corporation or an interest in the partnership or trust owned by the spouse having a market value equal to the value of the benefit the spouse has in respect of the property,

(iii) property over which a spouse has, either alone or in conjunction with another person, a power of appointment exercisable in favour of himself or herself, if the property would be a family asset if it were owned by the spouse, and

(iv) property disposed of by a spouse but over which the spouse has, either alone or in conjunction with another person, a power to revoke the disposition or a power to consume, invoke or dispose of the property, if the property would be a family asset if it were owned by the spouse,

but does not include property that the spouses have agreed by a domestic contract is not to be included in the family assets;

(b) "property" means real or personal property or any interest therein. 1978,c.6,s.4. property

4. (1) Subject to subsection (5), where a divorce is granted or a marriage is declared a nullity or where the spouses are separated and there is no reasonable prospect of the resumption of cohabitation, each spouse is entitled to have the family assets divided in equal shares by value notwithstanding the ownership of the assets by the spouses as determinable for other purposes and notwithstanding any order under section 6. Division of family assets.

(2) The court may, upon the application of a person who is the spouse of another, determine any matter respecting the division of family assets between them. Application to court

(3) The rights under subsection (1) are personal as between the spouses but any application commenced under subsection (2) before the death of a spouse may be continued by or against the estate of the deceased spouse. Effect of death of spouse

(4) For the purpose of determining the value of any property which Ante-nuptial property

(a) is a family asset; and

(b) was acquired by either spouse prior to the date of the marriage,

the court shall deduct from the net value of that property at the date of the hearing such sum as the court determines to be the value, at the date of the marriage, of the equity in that property owned by that spouse.

Variation of division

(5) The court may make a division of family assets resulting in shares that are not equal where the court is of the opinion that a division of the family assets in equal shares would be inequitable, having regard to

(a) any agreement other than a domestic contract;

(b) the duration of the period of cohabitation under the marriage;

(c) the duration of the period during which the spouses have lived separate and apart;

(d) the date when the property was acquired;

(e) the extent to which property was acquired by one spouse by inheritance or by gift; or

(f) any other circumstance relating to the acquisition, disposition, preservation, maintenance, improvement or use of property rendering it inequitable for the division of family assets to be in equal shares.

Property other than family assets

(6) Where in the opinion of the court, a spouse has unreasonably impoverished the family assets or the result of a division of the family assets would be inequitable in all the circumstances having regard to the considerations set out in clauses (5) (a) to (f), the court may make a division of any property that is not a family asset.

Purpose

(7) The purpose of this section is to recognize that inherent in the marital relationship there is mutual contribution by the spouses, whether financial or otherwise, to the family welfare, entitling each spouse to an equal division of the family assets upon termination of the marriage, subject to the equitable considerations set out in subsections (5) and (6). 1978,c.6,s.5.

Statement of property

5. (1) Where an application is made under section 4, each party shall file with the court and serve upon the other a statement verified by oath or statutory declaration disclosing particulars of all property of the party in the manner prescribed by regulations.

Evidence

(2) In an application under section 4 the onus shall lie on the party claiming that any particular item of property is not a family asset to adduce evidence to that effect.

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(3) Where, in the opinion of the court, the public disclosure of any information required to be contained in a statement under subsection (1) would be a hardship on the person giving the statement, the court may order that the statement and any cross-examination upon it before the hearing be treated as confidential and not form part of the public record. 1978,c.6,s.6. Order for sealing statement

6. In an application under section 4, the court may order Orders

(a) that the title to any specified property directed to a spouse in the division be transferred to or in trust for or vested in the spouse whether absolutely, for life or for a term of years;

(b) the partition or sale of any property;

(c) that payment be made out of the proceeds of sale to one or both spouses, and the amount thereof;

(d) that any property forming part of the share of either or both spouses be transferred to or in trust for or vested in a child to whom a spouse owes an obligation to provide support;

(e) that either or both spouses give security for the performance of any obligation imposed by the order, including a charge on property; and

(f) that either spouse pay to the other such sum as is set out in the order for the purpose of adjusting the division,

and may make such other orders or give such directions as are ancillary thereto. 1978,c.6,s.7.

7. Any person may apply to the court for the determination of any question between that person and his or her spouse or former spouse as to the ownership or right to possession of any particular property, except where an application or an order has been made respecting the property under section 4 or 6, and the court may Determination of questions of title between married persons

(a) declare the ownership or right to possession;

(b) where the property has been disposed of, order payment in compensation for the interest of either party;

(c) order that the property be partitioned or sold for the purpose of realizing the interest therein; and

(d) order that either or both spouses give security for the performance of any obligation imposed by the order including a charge on property,

and may make such other orders or give such directions as are ancillary thereto. 1978,c.6,s.8.

8. (1) Where one spouse or former spouse has contributed work, money or money's worth in respect of the acquisition, management, Contribution to property

maintenance, operation or improvement of property, other than family assets, in which the other has or had an interest, upon application, the court may by order

(a) direct the payment of an amount in compensation therefor; or

(b) award a share of the interest of the other spouse or former spouse in the property appropriate to the contribution.

Assessment of contribution

(2) For the purposes of subsection (1) the court shall determine and assess the contribution on the basis that a resulting trust is created by the contribution, unless the contrary is shown, and without regard to the relationship of husband and wife or the fact that the acts constituting the contribution are those of a reasonable spouse of that sex in the circumstances. 1978,c.6,s.9.

Interim orders for preservation

9. In or pending an application under section 4, 7 or 8, the court may make such interim order as it considers necessary for restraining the dissipation of the property and for the possession, delivering up, safekeeping and preservation of the property. 1978,c.6,s.10.

Realization of security

10. Where the court orders security for the performance of any obligation under this Part or charges a property therewith, the court may, upon application and notice to all persons having an interest in the property direct its sale for the purpose of realizing the security or charge. 1978,c.6,s.11.

Presumptions

11. (1) The rule of law applying a presumption of advancement in questions of the ownership of property as between husband and wife is abolished and in place thereof the rule of law applying a presumption of a resulting trust shall be applied in the same manner as if they were not married, except that

(a) the fact that property is placed or taken in the name of spouses as joint tenants shall be *prima facie* proof that each spouse is intended to have on the severance of the joint tenancy a one-half beneficial interest in the property; and

(b) money on deposit in a chartered bank, savings office, credit union or trust company in the name of both spouses shall be deemed to be in the name of the spouses as joint tenants for the purposes of clause (a).

Application

(2) Subsection (1) applies notwithstanding that the event giving rise to the presumption occurred before this section comes into force. 1978,c.6,s.12.

Application of Part

12. This Part applies notwithstanding that

(a) the spouses entered into the marriage before this Part comes into force; or

(b) the property in issue was acquired before this Part comes into force,

but does not apply in respect of property rights to which a claim has been made in a proceeding that was commenced before this Part comes into force. 1978,c.6,s.13.

Conflict of laws

13. (1) The division of family assets and the ownership as between spouses or former spouses of movable property wherever situate are governed by the internal law of the place where both spouses had their last common habitual residence or, where there is no place where the spouses had a common habitual residence, by the law of Prince Edward Island.

Idem

(2) The ownership of immovable property as between spouses or former spouses is governed by the internal law of the place where the land is situated, but where the law of Prince Edward Island is applicable respecting the division of family assets, the value of the property may be taken into consideration for the purposes of section 4. 1978,c.6,s.14.

PART II
SUPPORT OBLIGATIONS

Definitions

14. In this Part

dependant

(a) "dependant" means a person to whom another has an obligation to provide support under this Part;

spouse

(b) "spouse" means a spouse as defined in clause 1(f) and includes either of a man and woman between whom an order for support has been made under this Part or an order for alimony or maintenance has been made before this Part comes into force. 1978,c.6,s.15.

Obligation of spouses for support

15. Every spouse has an obligation to provide support for himself or herself and for the other spouse, in accordance with need, to the extent that he or she is capable of doing so. 1978,c.6,s.16.

Obligation of parent to support child

16. (1) Every parent has an obligation, to the extent the parent is capable of doing so, to provide support, in accordance with need, for his or her child who is unmarried and is under the age of eighteen years.

Idem

(2) The obligation under subsection (1) does not extend to a child who, being of the age of sixteen years or over, has withdrawn from parental control. 1978,c.6,s.17.

Obligation of child to support parent

17. Every child who is not a minor has an obligation to provide support, in accordance with need, for his or her parent who has cared for and provided support for the child, to the extent that the child is capable of doing so. 1978,c.6,s.17.

Order for support

18. (1) A court may, upon application, order a person to provide support for his or her dependants and determine the amount thereof.

Applicants

(2) An application for an order for the support of a dependant may be made by the dependant or a parent of the dependant or under subsection (3).

Idem

(3) An application for an order for the support of a dependant who is a spouse or a dependant child of the spouse may be made by

(a) the Department of Health and Social Services in the name of the Minister of Health and Social Services;

(b) an agency as defined in section 1 of the *Family and Child Services Act* R.S.P.E.I. 1988, Cap. F-2,

where the Department or agency is providing a benefit or assistance under the *Family and Child Services Act*, or the *Welfare Assistance Act* R.S.P.E.I. 1988, Cap. W-3 in respect of the support of the dependant.

Setting aside domestic contract

(4) The court may set aside a provision for support in a domestic contract or paternity agreement and may determine and order support in an application under subsection (1) notwithstanding that the contract or agreement contains an express provision excluding the application of this section

(a) where the provision for support or the waiver of the right to support results in circumstances that are unconscionable;

(b) where the provision for support is to a spouse who qualifies for an allowance for support out of public money; or

(c) where there has been default in the payment of support under the contract or agreement.

Determination of amount

(5) In determining the amount, if any, of support in relation to need, the court shall consider all the circumstances of the parties, including

(a) the assets and means of the dependant and of the respondent and any benefit or loss of benefit under a pension plan or annuity;

(b) the capacity of the dependant to provide for his or her own support;

(c) the capacity of the respondent to provide support;

(d) the age and the physical and mental health of the dependant and of the respondent;

(e) the length of time the dependant and respondent cohabited;

(f) the needs of the dependant, in determining which the court may have regard to the accustomed standard of living while the parties resided together;

(g) the measures available for the dependant to become financially independent and the length of time and cost involved to enable the dependant to take such measures;

(h) the legal obligation of the respondent to provide support for any other person;

(i) the desirability of the dependant or respondent remaining at home to care for a child;

(j) a contribution by the dependant to the realization of the career potential of the respondent;

(k) where the dependant is a child, his or her aptitude for and reasonable prospects of obtaining an education;

(l) where the dependant is a spouse, the effect on his or her earning capacity of the responsibilities assumed during cohabitation; and

(m) any other legal right of the dependant to support other than out of public money.

Conduct

(6) The obligation to provide support for a spouse exists without regard to the conduct of either spouse, but the court may in determining the amount of support have regard to a course of conduct that is so unconscionable as to constitute a repudiation of the relationship. 1978,c.6,s.19; 1980,c.2,s.3; 1981,c.12,s.53.

Powers of court

19. (1) In an application under section 18, the court may order

(a) an amount payable periodically, whether annually or otherwise and whether for an indefinite or limited period, or until the happening of a specified event;

(b) a lump sum to be paid or held in trust;

(c) any specified property to be transferred to or in trust for or vested in the dependant, whether absolutely, for life or for a term of years;

(d) any matter authorized to be ordered under clauses 39(1)(a) to (d) and subject to subsection 39(3);

(e) that all or any of the moneys payable under the order be paid into court or to any other appropriate person or agency for the benefit of the dependant;

(f) the payment of support to be made in respect of any period before the date of the order;

(g) the payment to an agency referred to in subsection 18(3) of any amount in reimbursement for a benefit or assistance referred to therein, including an amount in reimbursement for such benefit or assistance provided before the date of the order;

(h) the payment of expenses in respect of the prenatal care and birth of a child;

(i) that the obligation and liability for support continue after the death of the respondent and be a debt of his or her estate for such period as is fixed in the order;

(j) that a spouse who has a policy of life insurance as defined under Part V of the *Insurance Act* R.S.P.E.I. 1988, Cap. I-4 designate the other spouse or a child as the beneficiary irrevocably; and

(k) the securing of payment under the order, by a charge on property or otherwise.

Interim orders

(2) Where an application is made under section 18, the court may make such interim order as the court considers appropriate.

Assignment of support

(3) An order for support is assignable to an agency referred to in subsection 18(3).

Termination of support order on death

(4) Unless an order to provide support otherwise provides, it terminates upon the death of the person having the obligation to provide support, and the liabiity for amounts under the order coming due and unpaid in the preceding twelve months is a debt of his or her estate. 1978,c.6,s.20.

Effect of divorce proceedings

20. (1) Where an action for divorce is commenced under the *Divorce Act* 1985 (Canada) Stats. Can. 1986,c.4, any application for support under this Part that has not been determined is stayed except by leave of the court.

Idem

(2) Where a marriage is terminated by a divorce or declared a nullity and the question of support was not judicially determined in the divorce or nullity proceedings, an order for support made under this Part continues in force according to its terms. 1978,c.6,s.21; 1984,c.17,s.31.

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Review and variation of orders

21. (1) Where an order for support has been made and where the court is satisfied that there has been a material change in the circumstances of the dependant or the respondent or evidence has become available that was not available on the previous hearing, the court may, upon the application of any person named in the order or referred to in subsection 18(3), discharge, vary or suspend any term of the order, prospectively or retroactively, relieve the respondent from the payment of part or all of the arrears or any interest due thereon and make such other order under section 19 as the court considers appropriate in the circumstances referred to in subsection 18(5).

Limitation on applications for review

(2) No application under subsection (1) shall be made within six months after the making of the order for support or the disposition of any other application under subsection (1) in respect of the same order, except by leave of the court.

Existing orders

(3) This section applies to orders for maintenance or alimony made before this section comes into force or in a proceeding commenced before this section comes into force. 1978,c.6,s.22.

Restraining orders

22. In or pending an application under section 18, the court may make such interim or final order as it considers necessary for restraining the disposition or wasting of assets that would impair or defeat the claim for the payment of support. 1978,c.6,s.23; 1988,c.1,s.16.

Statement of financial affairs

23. (1) Where an application is made under section 18 or 21 each party shall file with the court and serve upon the other a statement verified by oath or statutory declaration disclosing particulars of financial information.

Order for sealing statement

(2) Where, in the opinion of the court, the public disclosure of any information required to be contained in a statement under subsection (1) would be a hardship on the person giving the statement, the court may order that the statement and any cross-examination upon it before the hearing be treated as confidential and not form part of the public record. 1978,c.6,s.24.

Absconding respondent or debtor

24. Where an application is made under section 18 and a judge of the court is satisfied that the respondent or debtor is about to leave the province, the judge may issue a warrant for the arrest of the respondent or debtor. 1978,c.6,s.25.

Access to records

25. (1) Where it appears to the court that for the purpose of bringing an application under this Part the proposed applicant or person in whose favour the order is made has need to learn or confirm the

whereabouts of the proposed respondent or person against whom the order is made, the court may order any person or public agency to provide the court with such particulars of the address as are contained in the records in his or its custody and the person or agency shall provide to the court such particulars as he or it is able to provide.

Section binds Crown

(2) This section binds the Crown in right of the province. 1978,c.6,s.26; 1984,c.17,s.31; 1988,c.1,s.16.

Realization of security

26. Where a court orders security for the payment of support under this Part or charges property therewith, the court may, upon application and notice to all persons having an interest in the property, direct its sale for the purpose of realizing the security or charge. 1978,c.6,s.32.

Pledging credit for necessaries

27. (1) During cohabitation, a spouse has authority to render himself or herself and his or her spouse jointly and severally liable to a third party for necessaries of life, except where the spouse has notified the third party that he or she has withdrawn the authority.

Liability for necessaries of minor

(2) Where a person is entitled to recover against a minor in respect of the provision of necessaries for the minor, each parent who has an obligation to support the minor is liable therefor jointly and severally with the minor.

Recovery between persons jointly liable

(3) Where persons are jointly and severally liable with each other under this section, their liability to each other shall be determined in accordance with their obligation to provide support.

Common law supplanted

(4) The provisions of this section apply in place of the rules of common law by which a wife may pledge the credit of her husband. 1978,c.6,s.33.

Order restraining harassment

28. Upon application, a court may make an order restraining the spouse or former spouse of the applicant from molesting, annoying or harassing the applicant or children in the lawful custody of the applicant and may require the spouse of the applicant to enter into such recognizance as the court considers appropriate. 1978,c.6,s.34.

Joinder of actions

29. An application for custody or access under the *Custody Jurisdiction and Enforcement Act* R.S.P.E.I. 1988, Cap. C-33 may be joined with an application under this Act, but the court may direct that an application for support stand over until an application for custody has been determined. 1984,c.17,s.31.

Appeal

30. An appeal lies from an order of the Family Section under this Part to the Appeal Division. 1978,c.6,s.36.

Contempt of orders of court

31. (1) In addition to its powers in respect of contempt, the court may punish by fine or imprisonment, or by both, any wilful contempt of or resistance to its process, rules or orders under this Act, but the fine shall not in any case exceed $1,000 nor shall the imprisonment exceed three months.

Conditions of imprisonment

(2) An order for imprisonment under subsection (1) may be made conditional upon default in the performance of a condition set out in the order and may provide for the imprisonments to be served intermittently. 1978,c.6,s.37.

PART III
MATRIMONIAL HOME

Interpretation

32. In this Part "property" means real or personal property. 1978,c.6,s.38.

Matrimonial home

33. (1) Property in which a married person has an interest and that is or has been occupied by the married person and his or her spouse as their family residence is their matrimonial home.

More than one matrimonial home

(2) Subsection (1) applies notwithstanding that its application results in more than one matrimonial home.

Ownership of shares

(3) The ownership of a share or shares, or of an interest in a share or shares, of a corporation entitling the owner to the occupation of a housing unit owned by the corporation shall be deemed to be an interest in the unit for the purposes of subsection (1).

Residence on farmland, etc.

(4) Where property that includes a matrimonial home is normally used for a purpose other than residential only, the matrimonial home is only such portion of the property as may reasonably be regarded as necessary to the use and enjoyment of the residence. 1978,c.6,s.39.

Right to possession

34. (1) A spouse is equally entitled to any right of possession of the other spouse in a matrimonial home.

Termination of right to possession

(2) Subject to an order of the court under this or any other Act, a right of a spouse to possession by virtue of subsection (1) ceases upon the spouse ceasing to be a spouse. 1978,c.6,s.40.

Registered designation of matrimonial home

35. (1) Both spouses may, by instrument in the form prescribed by the regulations, designate any property that is a matrimonial home and, upon the registration of the instrument and while there is a designation made by the spouses under this subsection that is not cancelled, any other property that would qualify as a matrimonial home under section 33 and that is not similarly designated ceases to be a matrimonial home.

Extent of designation

(2) The property that is designated as a matrimonial home under subsection (1) may include any property contiguous to the matrimonial home that is described for the purpose in the instrument.

Cancellation of designation

(3) The designation of a matrimonial home under subsection (1) is cancelled upon the registration of

(a) an instrument in the form prescribed by the regulations executed by both spouses;

(b) a decree absolute of divorce or judgment of nullity;

(c) an order under section 39 cancelling the designation; or

(d) proof of death of one of the spouses.

Effect of cancellation

(4) Upon the cancellation of the designation of a property under subsection (3), the property ceases to be a matrimonial home under section 33.

Revival of matrimonial homes

(5) Upon there ceasing to be a designation under subsection (1), section 33 applies in respect of property that is a matrimonial home. 1978,c.6,s.41.

Alienation of matrimonial home

36. (1) No spouse shall dispose of or encumber any interest in a matrimonial home unless

(a) the other spouse joins in the instrument or consents to the transaction;

(b) the other spouse has released all rights under this Part by a separation agreement;

(c) the transaction is authorized by court order or an order has been made releasing the property as a matrimonial home; or

(d) the property is not designated as a matrimonial home under section 35 and an instrument designating another property as a matrimonial home of the spouses is registered under section 35 and not cancelled.

Setting aside transaction

(2) Where a spouse disposes of or encumbers an interest in a matrimonial home in contravention of subsection (1), the transaction may be set aside on an application under section 38 unless the person holding the interest or encumbrance at the time of the application acquired it for value, in good faith and without notice that the property was at the time of the disposition, agreement or encumbrance a matrimonial home.

Proof that property not a matrimonial home

(3) For the purposes of subsection (2) an affidavit of the person making the disposition or encumbrance

(a) verifying that he or she is not, or was not, a spouse at the time of the disposition or encumbrance;

(b) verifying that the other spouse has released all rights under this Part by a separation agreement;

(c) verifying that the property has never been occupied by the person and his or her spouse as their matrimonial home; or

(d) where the property is not designated under section 35, verifying that an instrument designating another property as a matrimonial home of the person and his or her spouse is registered under section 35 and not cancelled,

shall, in the absence of actual notice by a spouse to the contrary, be deemed to be sufficient proof that the property is not a matrimonial home.

Liens arising by operation of law

(4) This section does not apply to the acquisition of an interest in property by operation of law. 1978,c.6,s.42.

Right of redemption and to notice

37. (1) Where a person is proceeding to realize upon a lien, encumbrance or execution or exercises a forfeiture against property that is a matrimonial home, the spouse who has a right of possession by virtue of section 34 has the same right of redemption or relief against forfeiture as the other spouse has and is entitled to any notice respecting the claim and its enforcement or realization to which the other spouse is entitled.

Service of notice

(2) Any notice to which a spouse is entitled by virtue of subsection (1) shall be deemed to be sufficiently given if served or given personally or by registered mail addressed to the person to whom notice is to be given at his or her usual or latest known address or, where none, the address of the matrimonial home, and, where notice is served or given by mail, the service shall be deemed to have been made on the fifth day after the day of mailing.

Effect of payments made by spouse

(3) Where a spouse makes any payment by way of or on account of redemption or relief against forfeiture under the right conferred by subsection (1), the payment shall be applied in satisfaction of the claim giving rise to the lien, encumbrance, execution or forfeiture. 1978,c.6,s.43.

Powers of court respecting alienation

38. The court may, on the application of a spouse or person having an interest in property, by order

(a) determine whether or not property is the matrimonial home and, if so, its extent;

(b) authorize the disposition or encumbrance of the matrimonial home where the court finds that the spouse whose consent is required

(i) cannot be found or is not available,

(ii) is not capable of giving or withholding consent, or

(iii) is unreasonably withholding consent,

subject to such terms and conditions including provision of other comparable accommodation or payment in place thereof as the court considers appropriate;

(c) dispense with any notice required to be given under section 37; and

(d) direct the setting aside of any transaction disposing of or encumbering an interest in the matrimonial home contrary to subsection 36(1) and the revesting of the interest or any part of the interest upon such terms and subject to such conditions as the court considers appropriate. 1978,c.6,s.44.

Order for possession of matrimonial home

39. (1) Notwithstanding the ownership of a matrimonial home and its contents, and notwithstanding section 34, the court on application may by order

(a) direct that one spouse be given exclusive possession of a matrimonial home or part thereof for life or for such lesser period as the court directs and release any other property that is a matrimonial home from the application of this Part;

(b) direct a spouse to whom exclusive possession of a matrimonial home is given to pay such periodic payments to the other spouse as is prescribed in the order;

(c) direct that the contents of a matrimonial home, or any part thereof, remain in the home for the use of the person given possession;

(d) fix the obligation to repair and maintain the matrimonial home or to pay other liabilities arising in respect thereof;

(e) authorize the disposition or encumbrance of the interest of a spouse in a matrimonial home subject to the right to exclusive possession of the other spouse as ordered; and

(f) where a false affidavit is given under subsection 36(3), direct

(i) the person who swore the affidavit, or

(ii) any person who knew at the time it was sworn that the affidavit was false and who thereafter conveyed the property,

to substitute other real property for the matrimonial home or direct such person to set aside money or security to stand in place thereof subject to such terms and conditions as the court considers appropriate.

Temporary possession

(2) An order may be made under subsection (1) for temporary relief or pending the bringing or disposition of another application under this Act.

(3) An order under subsection (1) for exclusive possession may be made only if in the opinion of the court, other provision for shelter is not adequate in the circumstances or it is in the best interests of a child to do so. 1978,c.6,s.45. Order where no property interest

40. (1) Upon the application of a person named in an order made under clause 39(1)(a), (b), (c) or (d) or the personal representative of that person and where the court is satisfied that there has been a material change in circumstances, the court may discharge, vary or suspend the order. Variation of possessory order

(2) Upon the application of a person who is subject to terms and conditions imposed in an order made under clause 38(b) or his personal representative and where the court is satisfied that the terms and conditions are no longer appropriate, the court may discharge, vary or suspend the terms and conditions. 1978,c.6,s.46. Variation of conditions of sale

41. In an application under this Part, the court may make such interim order as it considers necessary for the delivering up, safekeeping and preservation of the matrimonial home or its contents. 1978,c.6,s.47. Interim order for preservation of property

42. An order made under this Part is registrable against land under the *Registry Act* R.S.P.E.I. 1988, Cap. R-10. 1978,c.6,s.48. Registration of order

43. (1) This Part applies to matrimonial homes that are situated in the province. Application of Part

(2) This Part applies notwithstanding that *Idem*

(a) the spouses entered into the marriage before this Part comes into force; or

(b) the matrimonial home was acquired before this Part comes into force,

but does not apply to proceedings respecting possession of a matrimonial home that were commenced before this Part comes into force. 1978,c.6,s.49.

PART IV
DOMESTIC CONTRACTS

44. In this Part Definitions

(a) "cohabitation agreement" means an agreement entered into under section 46; cohabitation agreement

(b) "domestic contract" means a marriage contract, separation agreement or cohabitation agreement; domestic contract

marriage contract

(c) "marriage contract" means an agreement entered into under section 45;

separation agreement

(d) "separation agreement" means an agreement entered into under section 47. 1978,c.6,s.50.

Marriage contracts

45. (1) Two persons may enter into an agreement, before their marriage or during their marriage while cohabiting, in which they agree on their respective rights and obligations under the marriage or upon separation or the annulment or dissolution of the marriage or upon death, including

(a) ownership in or division of property;

(b) support obligations;

(c) the right to direct the education and moral training of their children, but not the right to custody of or access to their children; and

(d) any other matter in the settlement of their affairs.

Rights re matrimonial home expected

(2) Any provision in a marriage contract purporting to limit the rights of a spouse under Part III is void. 1978,c.6,s.51.

Cohabitation agreements

46. (1) A man and a woman who are cohabiting and not married to one another may enter into an agreement in which they agree on their respective rights and obligations during cohabitation, or upon ceasing to cohabit or death, including

(a) ownership in or division of property;

(b) support obligations;

(c) the right to direct the education and moral training of their children, but not the right to custody of or access to their children; and

(d) any other matter in the settlement of their affairs.

Effect of marriage on agreement

(2) Where the parties to an agreement entered into under subsection (1) subsequently marry, the agreement shall be deemed to be a marriage contract. 1978,c.6,s.52

Separation agreements

47. A man and woman who cohabited and are living separate and apart may enter into an agreement in which they agree on their respective rights and obligations, including

(a) ownership in or division of property;

(b) support obligations;

(c) the right to direct the education and moral training of their children;

(d) the right to custody of and access to their children; and

(e) any other matter in the settlement of their affairs. 1978,c.6,s.53.

Form of contract

48. (1) A domestic contract and any agreement to amend or rescind a domestic contract are void unless made in writing and signed by the persons to be bound and witnessed but consideration is not a requisite for the validity of a domestic contract.

Capacity of minor

(2) A minor who has capacity to contract marriage has capacity to enter into a marriage contract or separation agreement that is approved by the court, whether the approval is given before or after the contract or agreement is entered into.

Agreement on behalf of mentally incompetent

(3) The committee of a person who is mentally incompetent or, if the committee is the spouse of such person or, if there is no committee, the Official Trustee may, subject to the approval of the court, enter into a domestic contract or give any waiver or consent under this Act on behalf of the mentally incompetent person. 1978,c.6,s.54.

Subject to best interests of child

49. (1) In the determination of any matter respecting the support, education, moral training or custody of or access to a child, the court may disregard any provision of a domestic contract pertaining thereto where, in the opinion of the court, to do so is in the best interests of the child.

Dum casta clauses

(2) A provision in a separation agreement whether made before or after this section comes into force whereby any right of a spouse is dependent upon remaining chaste is void, but this subsection shall not be construed to affect a contingency upon remarriage or cohabitation with another.

Idem

(3) A provision in an agreement made before this section comes into force whereby any right of a spouse is dependent upon remaining chaste shall be given effect as a contingency upon remarriage or cohabitation with another. 1978,c.6,s.55.

Rights of donors of gifts

50. Where a domestic contract provides that specific gifts made to one or both parties by a third party donor are not disposable or encumberable without the consent of the donor, the donor shall be deemed to be a party to the contract for the purpose of the enforcement or any amendment of the provision. 1978,c.6,s.56.

Contracts made outside Prince Edward Island

51. The manner and formalities of making a domestic contract and its essential validity and effect are governed by the proper law of the contract, except that

(a) a contract for which the proper law is that of a jurisdiction other than Prince Edward Island, is also valid and enforceable in Prince Edward Island if entered into in accordance with the internal law of Prince Edward Island;

(b) subsection 18(4) and section 49 apply in Prince Edward Island to contracts for which the proper law is that of a jurisdiction other than Prince Edward Island; and

(c) a provision in a marriage contract or cohabitation agreement for which the proper law is that of a jurisdiction other than Prince Edward Island respecting the right to custody of or access to children is not valid or enforceable in Prince Edward Island. 1978,c.6,s.57.

Paternity agreements

52. (1) Where a man and a woman who are not spouses enter into an agreement for

(a) the payment of the expenses of prenatal care and birth in respect of a child;

(b) support of a child; or

(c) burial expenses of a child or mother,

on the application of a party to the agreement, the court may incorporate the agreement in an order, and Part II applies to the order in the same manner as if it were an order for support made under that Part.

Absconding respondent

(2) Where an application is made under subsection (1) and a judge of the court is satisfied that the respondent is about to leave the province, the judge may issue a warrant for the arrest of the respondent.

Capacity of minor

(3) A minor who has capacity to contract marriage has capacity to enter into an agreement under subsection (1) that is approved by the court, whether the approval is given before or after the agreement is entered into.

Application to pre-existing agreements

(4) This section applies to agreements referred to in subsection (1) that were made before this Part comes into force. 1978,c.6,s.58.

Application of Act to pre-existing contracts

53. (1) A separation agreement or marriage contract validly made before this Part comes into force shall be deemed to be a domestic contract for the purposes of this Act.

Contracts entered into before Part comes into force

(2) Where a domestic contract is entered into in accordance with this Part before this Part comes into force and

(a) the contract or any part would be valid if entered into after this Part comes into force; and

(b) the contract or part is entered into in contemplation of the coming into force of this Part,

the contract or part is not invalid for the reason only that it was entered into before this Part comes into force.

(3) Where pursuant to an understanding or agreement entered into before this Part comes into force by spouses who are living separate and apart, property is transferred between them, the transfer is effective as if made pursuant to a domestic contract. 1978,c.6,s.59. *Idem*

PART V
AMENDMENTS TO THE COMMON LAW AND STATUTE LAW

54. (1) For all purposes of the law of Prince Edward Island, a married man has a legal personality that is independent, separate and distinct from that of his wife and a married woman has a legal personality that is independent, separate and distinct from that of her husband. Unity of legal personality abolished

(2) A married person has and shall be accorded legal capacity for all purposes and in all respects as if such person were an unmarried person. Capacity of married person

(3) Without limiting the generality of subsections (1) and (2) *Idem*

(a) each of the parties to a marriage has the like right of action in tort against the other as if they were not married;

(b) a married woman is capable of acting as litigation guardian or next friend as if she were an unmarried woman;

(c) the same rules shall be applied to determine the domicile of a married woman as for a married man. 1978,c.6,s.60.

55. (1) Subject to subsection (2), a child who is a minor Domicile of minors

(a) takes the domicile of his or her parents, where both parents have a common domicile;

(b) takes the domicile of the parent with whom the child habitually resides, where the child resides with one parent only;

(c) takes the domicile of the father, where the domicile of the child cannot be determined under clause (a) or (b); or

(d) takes the domicile of the mother, where the domicile of the child cannot be determined under clause (c).

(2) The domicile of a minor who is or has been a spouse shall be determined in the same manner as if the minor were of full age. 1978,c.6,s.61. *Idem*

56. The Lieutenant Governor in Council may make regulations respecting any matter required to be or referred to as prescribed by the regulations and otherwise for the purpose of giving effect to this Act. 1978,c.6,s.69. Regulations

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ONTARIO

CHAPTER 4

An Act to revise the Family Law Reform Act

Assented to January 17th, 1986

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Preamble

Whereas it is desirable to encourage and strengthen the role of the family; and whereas for that purpose it is necessary to recognize the equal position of spouses as individuals within marriage and to recognize marriage as a form of partnership; and whereas in support of such recognition it is necessary to provide in law for the orderly and equitable settlement of the affairs of the spouses upon the breakdown of the partnership, and to provide for other mutual obligations in family relationships, including the equitable sharing by parents of responsibility for their children;

Therefore, Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

Definitions

1.—(1) In this Act,

"enfant"

"child" includes a person whom a parent has demonstrated a settled intention to treat as a child of his or her family, except under an arrangement where the child is placed for valuable consideration in a foster home by a person having lawful custody;

"cohabiter"

"cohabit" means to live together in a conjugal relationship, whether within or outside marriage;

"tribunal"

"court" means the Provincial Court (Family Division), the Unified Family Court, the District Court or the Supreme Court;

"contrat familial"

"domestic contract" means a domestic contract as defined in Part IV (Domestic Contracts);

"père ou mère" "parent" includes a person who has demonstrated a settled intention to treat a child as a child of his or her family, except under an arrangement where the child is placed for valuable consideration in a foster home by a person having lawful custody;

"accord de paternité" "paternity agreement" means a paternity agreement as defined in Part IV (Domestic Contracts);

"conjoint" "spouse" means either of a man and woman who,

(a) are married to each other, or

(b) have together entered into a marriage that is voidable or void, in good faith on the part of the person asserting a right under this Act.

Polygamous marriages (2) In the definition of "spouse", a reference to marriage includes a marriage that is actually or potentially polygamous, if it was celebrated in a jurisdiction whose system of law recognizes it as valid.

Staying application **2.**—(1) If, in an application under this Act, it appears to the court that for the appropriate determination of the spouses' affairs it is necessary or desirable to have other matters determined first or simultaneously, the court may stay the application until another proceeding is brought or determined as the court considers appropriate.

All proceedings in one court (2) Except as this Act provides otherwise, no person who is a party to an application under this Act shall make another application under this Act to another court, but the court may order that the proceeding be transferred to a court having other jurisdiction where, in the first court's opinion, the other court is more appropriate to determine the matters in issue that should be determined at the same time.

Applications in Supreme or District Court (3) In the Supreme or District Court, an application under this Act may be made by action or application.

Statement re removal of barriers to remarriage (4) A party to an application under section 7 (net family property), 10 (questions of title between spouses), 33 (support), 34 (powers of court) or 37 (variation) may serve on the other party and file with the court a statement, verified by oath or statutory declaration, indicating that,

(a) the author of the statement has removed all barriers that are within his or her control and that would prevent the other spouse's remarriage within that spouse's faith; and

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(b) the other party has not done so, despite a request.

Idem

(5) Within ten days after service of the statement, or within such longer period as the court allows, the party served with a statement under subsection (4) shall serve on the other party and file with the court a statement, verified by oath or statutory declaration, indicating that the author of the statement has removed all barriers that are within his or her control and that would prevent the other spouse's remarriage within that spouse's faith.

Dismissal, etc.

(6) When a party fails to comply with subsection (5),

(a) if the party is an applicant, the proceeding may be dismissed;

(b) if the party is a respondent, the defence may be struck out.

Exception

(7) Subsections (5) and (6) do not apply to a party who does not claim costs or other relief in the proceeding.

Extension of times

(8) The court may, on motion, extend a time prescribed by this Act if it is satisfied that,

(a) there are *prima facie* grounds for relief;

(b) relief is unavailable because of delay that has been incurred in good faith; and

(c) no person will suffer substantial prejudice by reason of the delay.

Incorporation of contract in order

(9) A provision of a domestic contract in respect of a matter that is dealt with in this Act may be incorporated in an order made under this Act.

Act subject to contracts

(10) A domestic contract dealing with a matter that is also dealt with in this Act prevails unless this Act provides otherwise.

Registration of orders

(11) An order made under this Act that affects real property does not affect the acquisition of an interest in the real property by a person acting in good faith without notice of the order, unless the order is registered in the proper land registry office.

Mediation

3.—(1) In an application under this Act, the court may, on motion, appoint a person whom the parties have selected to mediate any matter that the court specifies.

Consent to act

(2) The court shall appoint only a person who,

(a) has consented to act as mediator; and

(b) has agreed to file a report with the court within the period of time specified by the court.

Duty of mediator

(3) The mediator shall confer with the parties, and with the children if the mediator considers it appropriate to do so, and shall endeavour to obtain an agreement between the parties.

Full or limited report

(4) Before entering into mediation, the parties shall decide whether,

(a) the mediator is to file a full report on the mediation, including anything that he or she considers relevant; or

(b) the mediator is to file a limited report that sets out only the agreement reached by the parties or states only that the parties did not reach agreement.

Filing and copies of report

(5) The mediator shall file with the clerk or registrar of the court a full or limited report, as the parties have decided, and shall give a copy to each of the parties.

Admissions, etc., in the course of mediation

(6) If the parties have decided that the mediator is to file a limited report, no evidence of anything said or of any admission or communication made in the course of the mediation is admissible in any proceeding, except with the consent of all parties to the proceeding in which the mediator was appointed.

Fees and expenses

(7) The court shall require the parties to pay the mediator's fees and expenses and shall specify in the order the proportions or amounts of the fees and expenses that each party is required to pay.

Idem, serious financial hardship

(8) The court may require one party to pay all the mediator's fees and expenses if the court is satisfied that payment would cause the other party or parties serious financial hardship.

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PART I

FAMILY PROPERTY

Definitions

4.—(1) In this Part,

"tribunal"

"court" means a court as defined in subsection 1 (1), but does not include the Provincial Court (Family Division);

"foyer conjugal"

"matrimonial home" means a matrimonial home under section 18 and includes property that is a matrimonial home under that section at the valuation date;

"biens familiaux nets"

"net family property" means the value of all the property, except property described in subsection (2), that a spouse owns on the valuation date, after deducting,

(a) the spouse's debts and other liabilities, and

(b) the value of property, other than a matrimonial home, that the spouse owned on the date of the marriage, after deducting the spouse's debts and other liabilities, calculated as of the date of the marriage;

"bien"

"property" means any interest, present or future, vested or contingent, in real or personal property and includes,

(a) property over which a spouse has, alone or in conjunction with another person, a power of appointment exercisable in favour of himself or herself,

(b) property disposed of by a spouse but over which the spouse has, alone or in conjunction with another person, a power to revoke the disposition or a power to consume or dispose of the property, and

(c) in the case of a spouse's rights under a pension plan that have vested under clause 20 (1) (a) of the *Pension Benefits Act*, the employer's contributions to the spouse's pension;

R.S.O. 1980, c. 373

"date d'évaluation"

"valuation date" means the earliest of the following dates:

1. The date the spouses separate and there is no reasonable prospect that they will resume cohabitation.

2. The date a divorce is granted.

3. The date the marriage is declared a nullity.

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4. The date one of the spouses commences an application based on subsection 5 (3) (improvident depletion) that is subsequently granted.

5. The date before the date on which one of the spouses dies leaving the other spouse surviving.

Excluded property

(2) The value of the following property that a spouse owns on the valuation date does not form part of the spouse's net family property:

1. Property, other than a matrimonial home, that was acquired by gift or inheritance from a third person after the date of the marriage.

2. Income from property referred to in paragraph 1, if the donor or testator has expressly stated that it is to be excluded from the spouse's net family property.

3. Damages or a right to damages for personal injuries, nervous shock, mental distress or loss of guidance, care and companionship, or the part of a settlement that represents those damages.

4. Proceeds or a right to proceeds of a life insurance policy as defined in the *Insurance Act*.

R.S.O. 1980, c. 218

5. Property, other than a matrimonial home, into which property referred to in paragraphs 1 to 4 can be traced.

6. Property that the spouses have agreed by a domestic contract is not to be included in the spouse's net family property.

Onus of proof re deductions and exclusions

(3) The onus of proving a deduction under the definition of "net family property" or an exclusion under subsection (2) is on the person claiming it.

Close of business

(4) When this section requires that a value be calculated as of a given date, it shall be calculated as of close of business on that date.

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Net family property not to be less than zero

(5) If a spouse's net family property as calculated under subsections (1), (2) and (4) is less than zero, it shall be deemed to be equal to zero.

Equalization of net family properties

5.—(1) When a divorce is granted or a marriage is declared a nullity, or when the spouses are separated and there is no reasonable prospect that they will resume cohabitation, the spouse whose net family property is the lesser of the two net family properties is entitled to one-half the difference between them.

Idem

(2) When a spouse dies, if the net family property of the deceased spouse exceeds the net family property of the surviving spouse, the surviving spouse is entitled to one-half the difference between them.

Improvident depletion of spouse's net family property

(3) [redacted] spouses are cohabiting, if there is a serious danger that one spouse may improvidently deplete his or her net family property, the other spouse may on an application under section 7 have the difference between the net family properties divided as if the spouses were separated and there were no reasonable prospect that they would resume cohabitation.

No further division

(4) After the court has made an order for division based on subsection (3), neither spouse may make a further application under section 7 in respect of their marriage.

Idem

(5) Subsection (4) applies even though the spouses continue to cohabit, unless a domestic contract between the spouses provides otherwise.

Variation of share

(6) The court may award a spouse an amount that is more or less than half the difference between the net family properties if the court is of the opinion that equalizing the net family properties would be unconscionable, having regard to,

(a) a spouse's failure to disclose to the other spouse debts or other liabilities existing at the date of the marriage;

(b) the fact that debts or other liabilities claimed in reduction of a spouse's net family property were incurred recklessly or in bad faith;

(c) the part of a spouse's net family property that consists of gifts made by the other spouse;

(d) a spouse's intentional or reckless depletion of his or her net family property;

(e) the fact that the amount a spouse would otherwise receive under subsection (1), (2) or (3) is disproportionately large in relation to a period of cohabitation that is less than five years;

(f) the fact that one spouse has incurred a disproportionately larger amount of debts or other liabilities than the other spouse for the support of the family;

(g) a written agreement between the spouses that is not a domestic contract; or

(h) any other circumstance relating to the acquisition, disposition, preservation, maintenance or improvement of property.

Purpose

(7) The purpose of this section is to recognize that child care, household management and financial provision are the joint responsibilities of the spouses and that inherent in the marital relationship there is equal contribution, whether financial or otherwise, by the spouses to the assumption of these responsibilities, entitling each spouse to the equalization of the net family properties, subject only to the equitable considerations set out in subsection (6).

Election: spouse's will

6.—(1) When a spouse dies leaving a will, the surviving spouse shall elect to take under the will or to receive the entitlement under section 5.

Idem: spouse's intestacy

(2) When a spouse dies intestate, the surviving spouse shall elect to receive the entitlement under Part II of the *Succession Law Reform Act* or to receive the entitlement under section 5.

R.S.O. 1980, c. 488

Idem: spouse's partial intestacy

(3) When a spouse dies testate as to some property and intestate as to other property, the surviving spouse shall elect to take under the will and to receive the entitlement under Part II of the *Succession Law Reform Act*, or to receive the entitlement under section 5.

Property outside estate

(4) A surviving spouse who elects to take under the will or to receive the entitlement under Part II of the *Succession Law Reform Act*, or both in the case of a partial intestacy, shall also receive the other property to which he or she is entitled because of the first spouse's death.

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Gifts by will

(5) The surviving spouse shall receive the gifts made to him or her in the deceased spouse's will in addition to the entitlement under section 5 if the will expressly provides for that result.

Insurance, etc. R.S.O. 1980, c. 218

(6) A surviving spouse who is the beneficiary of a policy of life insurance, as defined in the *Insurance Act*, that was taken out on the life of the deceased spouse and owned by the deceased spouse or was taken out on the lives of a group of which he or she was a member, or is the beneficiary under a pension plan or similar plan that provides a payment on the death of the deceased spouse, shall receive payment under the policy or plan in addition to the entitlement under section 5, if a written designation by the deceased spouse expressly provides for that result.

Effect of election to receive entitlement under section 5

(7) When a surviving spouse elects to receive the entitlement under section 5, the gifts made to him or her in the deceased spouse's will are revoked and the will shall be interpreted as if the surviving spouse had died before the other, unless the will expressly provides that the gifts are in addition to the entitlement under section 5.

Idem

(8) When a surviving spouse elects to receive the entitlement under section 5, the spouse shall be deemed to have disclaimed,

R.S.O. 1980, c. 488

(a) the entitlement under Part II of the *Succession Law Reform Act*; and

(b) the right to receive payment under an insurance policy or pension plan or similar plan as described in subsection (6), unless a written designation by the deceased spouse expressly provides that the payment is in addition to the entitlement under section 5.

Manner of making election

(9) The surviving spouse's election shall be filed in the office of the Surrogate Clerk for Ontario within six months after the first spouse's death.

Deemed election

R.S.O. 1980, c. 488

(10) If the surviving spouse does not file the election within that time, he or she shall be deemed to have elected to take under the will or to receive the entitlement under the *Succession Law Reform Act*, or both, as the case may be, unless the court, on application, orders otherwise.

Priority of spouse's entitlement

(11) The spouse's entitlement under section 5 has priority over,

(a) the gifts made in the deceased spouse's will, if any, subject to subsection (12);

R.S.O. 1980, c. 488

(b) a person's right to a share of the estate under Part II (Intestate Succession) of the *Succession Law Reform Act*;

(c) an order made against the estate under Part V (Support of Dependants) of the *Succession Law Reform Act*, except an order in favour of a child of the deceased spouse.

Exception

(12) The spouse's entitlement under section 5 does not have priority over a gift by will made in accordance with a contract that the deceased spouse entered into in good faith and for valuable consideration, except to the extent that the value of the gift, in the court's opinion, exceeds the consideration.

Distribution within six months of death restricted

(13) No distribution shall be made in the administration of a deceased spouse's estate within six months of the spouse's death, unless,

(a) the surviving spouse gives written consent to the distribution; or

(b) the court authorizes the distribution.

Idem, notice of application

(14) No distribution shall be made in the administration of a deceased spouse's death after the personal representative has received notice of an application under this Part, unless,

(a) the applicant gives written consent to the distribution; or

(b) the court authorizes the distribution.

Extension of limitation period

(15) If the court extends the time for a spouse's application based on subsection 5 (2), any property of the deceased spouse that is distributed before the date of the order and without notice of the application shall not be brought into the calculation of the deceased spouse's net family property.

Exception

(16) Subsections (13) and (14) do not prohibit reasonable advances to dependants of the deceased spouse for their support.

Definition

R.S.O. 1980, c. 488

(17) In subsection (16), "dependant" has the same meaning as in Part V of the *Succession Law Reform Act*.

Liability of personal representative

(18) If the personal representative makes a distribution that contravenes subsection (13) or (14), the court makes an order against the estate under this Part and the undistributed portion of the estate is not sufficient to satisfy the order, the per-

sonal representative is personally liable to the applicant for the amount that was distributed or the amount that is required to satisfy the order, whichever is less.

Order suspending administration

(19) On motion by the surviving spouse, the court may make an order suspending the administration of the deceased spouse's estate for the time and to the extent that the court decides.

Application to court

7.—(1) The court may, on the application of a spouse, former spouse or deceased spouse's personal representative, determine any matter respecting the spouses' entitlement under section 5.

Personal action: estates

(2) Entitlement under subsections 5 (1), (2) and (3) is personal as between the spouses but,

(a) an application based on subsection 5 (1) or (3) and commenced before a spouse's death may be continued by or against the deceased spouse's estate; and

(b) an application based on subsection 5 (2) may be made by or against a deceased spouse's estate.

Limitation

(3) An application based on subsection 5 (1) or (2) shall not be brought after the earliest of,

(a) two years after the day the marriage is terminated by divorce or judgment of nullity;

(b) six years after the day the spouses separate and there is no reasonable prospect that they will resume cohabitation;

(c) six months after the first spouse's death.

Statement of property

8. In an application under section 7, each party shall serve on the other and file with the court, in the manner and form prescribed by the rules of the court, a statement verified by oath or statutory declaration disclosing particulars of,

(a) the party's property and debts and other liabilities,

(i) as of the date of the marriage,

(ii) as of the valuation date, and

(iii) as of the date of the statement:

(b) the deductions that the party claims under the definition of "net family property";

(c) the exclusions that the party claims under subsection 4 (2); and

(d) all property that the party disposed of during the two years immediately preceding the making of the statement, or during the marriage, whichever period is shorter.

Powers of court

9.—(1) In an application under section 7, the court may order,

(a) that one spouse pay to the other spouse the amount to which the court finds that spouse to be entitled under this Part;

(b) that security, including a charge on property, be given for the performance of an obligation imposed by the order;

(c) that, if necessary to avoid hardship, an amount referred to in clause (a) be paid in instalments during a period not exceeding ten years or that payment of all or part of the amount be delayed for a period not exceeding ten years; and

(d) that, if appropriate to satisfy an obligation imposed by the order,

(i) property be transferred to or in trust for or vested in a spouse, whether absolutely, for life or for a term of years, or

(ii) any property be partitioned or sold.

Financial information, inspections

(2) The court may, at the time of making an order for instalment or delayed payments or on motion at a later time, order that the spouse who has the obligation to make payments shall,

(a) furnish the other spouse with specified financial information, which may include periodic financial statements; and

(b) permit inspections of specified property of the spouse by or on behalf of the other spouse, as the court directs.

Variation

(3) If the court is satisfied that there has been a material change in the circumstances of the spouse who has the obligation to make instalment or delayed payments, the court may, on motion, vary the order, but shall not vary the amount to which the court found the spouse to be entitled under this Part.

Ten year period

(4) Subsections (3) and 2 (8) (extension of times) do not permit the postponement of payment beyond the ten year period mentioned in clause (1) (c).

Determination of questions of title between spouses

10.—(1) A person may apply to the court for the determination of a question between that person and his or her spouse or former spouse as to the ownership or right to possession of particular property, other than a question arising out of an equalization of net family properties under section 5, and the court may,

(a) declare the ownership or right to possession;

(b) if the property has been disposed of, order payment in compensation for the interest of either party;

(c) order that the property be partitioned or sold for the purpose of realizing the interests in it; and

(d) order that either or both spouses give security, including a charge on property, for the performance of an obligation imposed by the order,

and may make ancillary orders or give ancillary directions.

Estates

(2) An application based on subsection (1) may be made by or continued against the estate of a deceased spouse.

Operating business or farm

11.—(1) An order made under section 9 or 10 shall not be made so as to require or result in the sale of an operating business or farm or so as to seriously impair its operation, unless there is no reasonable alternative method of satisfying the award.

Idem

(2) To comply with subsection (1), the court may,

(a) order that one spouse pay to the other a share of the profits from the business or farm; and

(b) if the business or farm is incorporated, order that one spouse transfer or have the corporation issue to the other shares in the corporation.

Orders for preservation

12. In an application under section 7 or 10, if the court considers it necessary for the protection of the other spouse's interests under this Part, the court may make an interim or final order,

(a) restraining the depletion of a spouse's property; and

(b) for the possession, delivering up, safekeeping and preservation of the property.

Variation and realization of security

13. If the court has ordered security or charged a property with security for the performance of an obligation under this Part, the court may, on motion,

(a) vary or discharge the order; or

(b) on notice to all persons having an interest in the property, direct its sale for the purpose of realizing the security or charge.

Presumptions

14. The rule of law applying a presumption of a resulting trust shall be applied in questions of the ownership of property between husband and wife, as if they were not married, except that,

(a) the fact that property is held in the name of spouses as joint tenants is *prima facie* proof that the spouses are intended to own the property as joint tenants; and

(b) money on deposit in the name of both spouses shall be deemed to be in the name of the spouses as joint tenants for the purposes of clause (a).

Conflict of laws

15. The property rights of spouses arising out of the marital relationship are governed by the internal law of the place where both spouses had their last common habitual residence or, if there is no place where the spouses had a common habitual residence, by the law of Ontario.

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Application of Part

16.—(1) This Part applies to property owned by spouses.

(a) whether they were married before or after this Act comes into force; and

(b) whether the property was acquired before or after this Act comes into force.

Application of s. 14

(2) Section 14 applies whether the event giving rise to the presumption occurred before or after this Act comes into force.

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PART II

MATRIMONIAL HOME

Definitions

17. In this Part.

"tribunal"

"court" means a court as defined in subsection 1 (1) but does not include the Provincial Court (Family Division);

"bien"

"property" means real or personal property.

Matrimonial home

18.—(1) Every property in which a person has an interest and that is or, if the spouses have separated, was at the time of separation ordinarily occupied by the person and his or her spouse as their family residence is their matrimonial home.

Ownership of shares

(2) The ownership of a share or shares, or of an interest in a share or shares, of a corporation entitling the owner to occupy a housing unit owned by the corporation shall be deemed to be an interest in the unit for the purposes of subsection (1).

Residence on farmland, etc.

(3) If property that includes a matrimonial home is normally used for a purpose other than residential, the matrimonial home is only the part of the property that may reasonably be regarded as necessary to the use and enjoyment of the residence.

Possession of matrimonial home

19.—(1) Both spouses have an equal right to possession of a matrimonial home.

Idem

(2) When only one of the spouses has an interest in a matrimonial home, the other spouse's right of possession,

(a) is personal as against the first spouse; and

(b) ends when they cease to be spouses, unless a separation agreement or court order provides otherwise.

Designation of matrimonial home

20.—(1) One or both spouses may designate property owned by one or both of them as a matrimonial home, in the form prescribed by the regulations made under this Act.

Contiguous property

(2) The designation may include property that is described in the designation and is contiguous to the matrimonial home.

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Registration

(3) The designation may be registered in the proper land registry office.

Effect of designation by both spouses

(4) On the registration of a designation made by both spouses, any other property that is a matrimonial home under section 18 but is not designated by both spouses ceases to be a matrimonial home.

Effect of designation by one spouse

(5) On the registration of a designation made by one spouse only, any other property that is a matrimonial home under section 18 remains a matrimonial home.

Cancellation of designation

(6) The designation of a matrimonial home is cancelled, and the property ceases to be a matrimonial home, on the registration or deposit of,

(a) a cancellation, executed by the person or persons who made the original designation, in the form prescribed by the regulations made under this Act;

(b) a decree absolute of divorce or judgment of nullity;

(c) an order under clause 23 (e) cancelling the designation; or

(d) proof of death of one of the spouses.

Revival of other matrimonial homes

(7) When a designation of a matrimonial home made by both spouses is cancelled, section 18 applies again in respect of other property that is a matrimonial home.

Alienation of matrimonial home

21.—(1) No spouse shall dispose of or encumber an interest in a matrimonial home unless,

(a) the other spouse joins in the instrument or consents to the transaction;

(b) the other spouse has released all rights under this Part by a separation agreement;

(c) a court order has authorized the transaction or has released the property from the application of this Part; or

(d) the property is not designated by both spouses as a matrimonial home and a designation of another

property as a matrimonial home, made by both spouses, is registered and not cancelled.

Setting aside transaction

(2) If a spouse disposes of or encumbers an interest in a matrimonial home in contravention of subsection (1), the transaction may be set aside on an application under section 23, unless the person holding the interest or encumbrance at the time of the application acquired it for value, in good faith and without notice, at the time of acquiring it or making an agreement to acquire it, that the property was a matrimonial home.

Proof that property not a matrimonial home

(3) For the purpose of subsection (2), a statement by the person making the disposition or encumbrance,

(a) verifying that he or she is not, or was not, a spouse at the time of the disposition or encumbrance;

(b) verifying that the person is a spouse who is not separated from his or her spouse and that the property is not ordinarily occupied by the spouses as their family residence;

(c) verifying that the person is a spouse who is separated from his or her spouse and that the property was not ordinarily occupied by the spouses, at the time of their separation, as their family residence;

(d) where the property is not designated by both spouses as a matrimonial home, verifying that a designation of another property as a matrimonial home, made by both spouses, is registered and not cancelled; or

(e) verifying that the other spouse has released all rights under this Part by a separation agreement,

shall, unless the person to whom the disposition or encumbrance is made had notice to the contrary, be deemed to be sufficient proof that the property is not a matrimonial home.

Idem, attorney's personal knowledge

(4) The statement shall be deemed to be sufficient proof that the property is not a matrimonial home if it is made by the attorney of the person making the disposition or encumbrance, on the basis of the attorney's personal knowledge.

Liens arising by operation of law

R.S.O. 1980, c. 234

(5) This section does not apply to the acquisition of an interest in property by operation of law or to the acquisition of a lien under section 18 of the *Legal Aid Act*.

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Right of redemption and to notice

22.—(1) When a person proceeds to realize upon a lien, encumbrance or execution or exercises a forfeiture against property that is a matrimonial home, the spouse who has a right of possession under section 19 has the same right of redemption or relief against forfeiture as the other spouse and is entitled to the same notice respecting the claim and its enforcement or realization.

Service of notice

(2) A notice to which a spouse is entitled under subsection (1) shall be deemed to be sufficiently given if served or given personally or by registered mail addressed to the spouse at his or her usual or last known address or, if none, the address of the matrimonial home, and, if notice is served or given by mail, the service shall be deemed to have been made on the fifth day after the day of mailing.

Idem: power of sale

R.S.O. 1950, c. 296

(3) When a person exercises a power of sale against property that is a matrimonial home, sections 32 and 33 of the *Mortgages Act* apply and subsection (2) does not apply.

Payments by spouse

(4) If a spouse makes a payment in exercise of the right conferred by subsection (1), the payment shall be applied in satisfaction of the claim giving rise to the lien, encumbrance, execution or forfeiture.

Realization may continue in spouse's absence

R.S.O. 1950, c. 296

(5) Despite any other Act, when a person who proceeds to realize upon a lien, encumbrance or execution or exercises a forfeiture does not have sufficient particulars of a spouse for the purpose and there is no response to a notice given under subsection (2) or under section 32 of the *Mortgages Act*, the realization or exercise of forfeiture may continue in the absence and without regard to the interest of the spouse and the spouse's rights under this section end on the completion of the realization or forfeiture.

Powers of court respecting alienation

23. The court may, on the application of a spouse or person having an interest in property, by order,

(a) determine whether or not the property is a matrimonial home and, if so, its extent;

(b) authorize the disposition or encumbrance of the matrimonial home if the court finds that the spouse whose consent is required,

(i) cannot be found or is not available,

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(ii) is not capable of giving or withholding consent, or

(iii) is unreasonably withholding consent,

subject to any conditions, including provision of other comparable accommodation or payment in place of it, that the court considers appropriate;

(c) dispense with a notice required to be given under section 22;

(d) direct the setting aside of a transaction disposing of or encumbering an interest in the matrimonial home contrary to subsection 21 (1) and the revesting of the interest or any part of it on the conditions that the court considers appropriate; and

(e) cancel a designation made under section 20 if the property is not a matrimonial home.

Order for possession of matrimonial home

24.—(1) Regardless of the ownership of a matrimonial home and its contents, and despite section 19 (spouse's right of possession), the court may on application, by order,

(a) provide for the delivering up, safekeeping and preservation of the matrimonial home and its contents;

(b) direct that one spouse be given exclusive possession of the matrimonial home or part of it for the period that the court directs and release other property that is a matrimonial home from the application of this Part;

(c) direct a spouse to whom exclusive possession of the matrimonial home is given to make periodic payments to the other spouse;

(d) direct that the contents of the matrimonial home, or any part of them,

(i) remain in the home for the use of the spouse given possession, or

(ii) be removed from the home for the use of a spouse or child;

(e) order a spouse to pay for all or part of the repair and maintenance of the matrimonial home and of other liabilities arising in respect of it, or to make

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periodic payments to the other spouse for those purposes:

(f) authorize the disposition or encumbrance of a spouse's interest in the matrimonial home, subject to the other spouse's right of exclusive possession as ordered; and

(g) where a false statement is made under subsection 21 (3), direct,

(i) the person who made the false statement, or

(ii) a person who knew at the time he or she acquired an interest in the property that the statement was false and afterwards conveyed the interest,

to substitute other real property for the matrimonial home, or direct the person to set aside money or security to stand in place of it, subject to any conditions that the court considers appropriate.

Temporary or interim order

(2) The court may, on motion, make a temporary or interim order under clause (1) (a), (b), (c), (d) or (e).

Order for exclusive possession: criteria

(3) In determining whether to make an order for exclusive possession, the court shall consider,

(a) the best interests of the children affected;

(b) any existing orders under Part I (Family Property) and any existing support orders;

(c) the financial position of both spouses;

(d) any written agreement between the parties;

(e) the availability of other suitable and affordable accommodation; and

(f) any violence committed by a spouse against the other spouse or the children.

Best interests of child

(4) In determining the best interests of a child, the court shall consider,

(a) the possible disruptive effects on the child of a move to other accommodation; and

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(b) the child's views and preferences, if they can reasonably be ascertained.

Offence

(5) A person who contravenes an order for exclusive possession is guilty of an offence and upon conviction is liable,

(a) in the case of a first offence, to a fine of not more than $1,000 or to imprisonment for a term of not more than three months, or to both; and

(b) in the case of a second or subsequent offence, to a fine of not more than $10,000 or to imprisonment for a term of not more than two years, or to both.

Arrest without warrant

(6) A police officer may arrest without warrant a person the police officer believes on reasonable and probable grounds to have contravened an order for exclusive possession.

Existing orders

R.S.O. 1980, c. 152

(7) Subsections (5) and (6) also apply in respect of contraventions, committed after this Act comes into force, of orders for exclusive possession made under Part III of the *Family Law Reform Act*.

Variation of possessory order

25.—(1) On the application of a person named in an order made under clause 24 (1) (a), (b), (c), (d) or (e) or his or her personal representative, if the court is satisfied that there has been a material change in circumstances, the court may discharge, vary or suspend the order.

Variation of conditions of sale

(2) On the motion of a person who is subject to conditions imposed in an order made under clause 23 (b) or (d) or 24 (1) (g), or his or her personal representative, if the court is satisfied that the conditions are no longer appropriate, the court may discharge, vary or suspend them.

Existing orders

R.S.O. 1980, c. 152

(3) Subsections (1) and (2) also apply to orders made under the corresponding provisions of Part III of the *Family Law Reform Act*.

Joint tenancy in matrimonial home

26.—(1) If a spouse dies owning an interest in a matrimonial home as a joint tenant with a third person and not with the other spouse, the joint tenancy shall be deemed to have been severed immediately before the time of death.

Sixty day period after spouse's death

(2) Despite clauses 19 (2) (a) and (b) (termination of spouse's right of possession), a spouse who has no interest in a matrimonial home but is occupying it at the time of the other spouse's death, whether under an order for exclusive possession or otherwise, is entitled to retain possession against the spouse's estate, rent free, for sixty days after the spouse's death.

Registration of order R.S.O. 1980, cc. 152, 445, 230

27. Orders made under this Part or under Part III of the *Family Law Reform Act* are registrable against land under the *Registry Act* and the *Land Titles Act*.

Application of Part

28.—(1) This Part applies to matrimonial homes that are situated in Ontario.

Idem

(2) This Part applies,

(a) whether the spouses were married before or after this Act comes into force; and

(b) whether the matrimonial home was acquired before or after this Act comes into force.

PART III

SUPPORT OBLIGATIONS

Definitions

29. In this Part,

"personne à charge"

"dependant" means a person to whom another has an obligation to provide support under this Part;

"conjoint"

"spouse" means a spouse as defined in subsection 1 (1), and in addition includes either of a man and woman who are not married to each other and have cohabited,

(a) continuously for a period of not less than three years, or

(b) in a relationship of some permanence, if they are the natural or adoptive parents of a child.

Obligation of spouses for support

30. Every spouse has an obligation to provide support for himself or herself and for the other spouse, in accordance with need, to the extent that he or she is capable of doing so.

Obligation of parent to support child

31.—(1) Every parent has an obligation to provide support, in accordance with need, for his or her unmarried child who is a minor or is enrolled in a full time program of education, to the extent that the parent is capable of doing so.

Idem

(2) The obligation under subsection (1) does not extend to a child who is sixteen years of age or older and has withdrawn from parental control.

Obligation of child to support parent

32. Every child who is not a minor has an obligation to provide support, in accordance with need, for his or her parent who has cared for or provided support for the child, to the extent that the child is capable of doing so.

Order for support

33.—(1) A court may, on application, order a person to provide support for his or her dependants and determine the amount of support.

Applicants

(2) An application for an order for the support of a dependant may be made by the dependant or the dependant's parent.

Idem

(3) An application for an order for the support of a dependant who is the respondent's spouse or child may also be made by one of the following agencies:

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(a) the Ministry of Community and Social Services in the name of the Minister;

(b) a municipal corporation, including a metropolitan, district or regional municipality, but not including an area municipality;

(c) a district welfare administration board under the *District Welfare Administration Boards Act*; or

R.S.O. 1980, c. 122

R.S.O. 1980, c. 188

(d) a band approved under section 15 of the *General Welfare Assistance Act*,

R.S.O. 1980, cc. 151, 188

if the agency is providing or has provided a benefit under the *Family Benefits Act* or assistance under the *General Welfare Assistance Act* in respect of the dependant's support, or if an application for such a benefit or assistance has been made to the agency by or on behalf of the dependant.

Setting aside domestic contract

(4) The court may set aside a provision for support or a waiver of the right to support in a domestic contract or paternity agreement and may determine and order support in an application under subsection (1) although the contract or agreement contains an express provision excluding the application of this section.

(a) if the provision for support or the waiver of the right to support results in unconscionable circumstances;

(b) if the provision for support is in favour of or the waiver is by or on behalf of a dependant who qualifies for an allowance for support out of public money; or

(c) if there is default in the payment of support under the contract or agreement at the time the application is made.

Adding party

(5) In an application the court may, on a respondent's motion, add as a party another person who may have an obligation to provide support to the same dependant.

Idem

(6) In an action in the Supreme Court or District Court, the defendant may add as a third party another person who may have an obligation to provide support to the same dependant.

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Purposes of order for support of child

(7) An order for the support of a child should,

(a) recognize that each parent has an obligation to provide support for the child;

(b) recognize that the obligation of a natural or adoptive parent outweighs the obligation of a parent who is not a natural or adoptive parent; and

(c) apportion the obligation according to the capacities of the parents to provide support.

Purposes of order for support of spouse

(8) An order for the support of a spouse should,

(a) recognize the spouse's contribution to the relationship and the economic consequences of the relationship for the spouse;

(b) share the economic burden of child support equitably;

(c) make fair provision to assist the spouse to become able to contribute to his or her own support; and

(d) relieve financial hardship, if this has not been done by orders under Parts I (Family Property) and II (Matrimonial Home).

Determination of amount

(9) In determining the amount and duration, if any, of support in relation to need, the court shall consider all the circumstances of the parties, including,

(a) the dependant's and respondent's current assets and means;

(b) the assets and means that the dependant and respondent are likely to have in the future;

(c) the dependant's capacity to contribute to his or her own support;

(d) the respondent's capacity to provide support;

(e) the dependant's and respondent's age and physical and mental health;

(f) the dependant's needs, in determining which the court shall have regard to the accustomed standard of living while the parties resided together;

(g) the measures available for the dependant to become able to provide for his or her own support and the length of time and cost involved to enable the dependant to take those measures;

(h) any legal obligation of the respondent or dependant to provide support for another person;

(i) the desirability of the dependant or respondent remaining at home to care for a child;

(j) a contribution by the dependant to the realization of the respondent's career potential;

(k) if the dependant is a child,

(i) the child's aptitude for and reasonable prospects of obtaining an education, and

(ii) the child's need for a stable environment;

(l) if the dependant is a spouse,

(i) the length of time the dependant and respondent cohabited,

(ii) the effect on the spouse's earning capacity of the responsibilities assumed during cohabitation,

(iii) whether the spouse has undertaken the care of a child who is of the age of eighteen years or over and unable by reason of illness, disability or other cause to withdraw from the charge of his or her parents,

(iv) whether the spouse has undertaken to assist in the continuation of a program of education for a child eighteen years of age or over who is unable for that reason to withdraw from the charge of his or her parents,

(v) any housekeeping, child care or other domestic service performed by the spouse for the family, as if the spouse were devoting the time spent in performing that service in remunerative employment and were contributing the earnings to the family's support,

(vi) the effect on the spouse's earnings and career development of the responsibility of caring for a child; and

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(m) any other legal right of the dependant to support, other than out of public money.

Conduct

(10) The obligation to provide support for a spouse exists without regard to the conduct of either spouse, but the court may in determining the amount of support have regard to a course of conduct that is so unconscionable as to constitute an obvious and gross repudiation of the relationship.

Powers of court

34.—(1) In an application under section 33, the court may make an interim or final order,

(a) requiring that an amount be paid periodically, whether annually or otherwise and whether for an indefinite or limited period, or until the happening of a specified event;

(b) requiring that a lump sum be paid or held in trust;

(c) requiring that property be transferred to or in trust for or vested in the dependant, whether absolutely, for life or for a term of years;

(d) respecting any matter authorized to be ordered under clause 24 (1) (a), (b), (c), (d) or (e) (matrimonial home);

(e) requiring that some or all of the money payable under the order be paid into court or to another appropriate person or agency for the dependant's benefit;

(f) requiring that support be paid in respect of any period before the date of the order;

(g) requiring payment to an agency referred to in subsection 33 (3) of an amount in reimbursement for a benefit or assistance referred to in that subsection, including a benefit or assistance provided before the date of the order;

(h) requiring payment of expenses in respect of a child's prenatal care and birth;

R.S.O. 1980, c. 218

(i) requiring that a spouse who has a policy of life insurance as defined in the *Insurance Act* designate the other spouse or a child as the beneficiary irrevocably;

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(j) requiring that a spouse who has an interest in a pension plan or other benefit plan designate the other spouse or a child as beneficiary under the plan and not change that designation; and

(k) requiring the securing of payment under the order, by a charge on property or otherwise.

Limitation on family court's jurisdiction

(2) The Provincial Court (Family Division) shall not make an order under clause (1) (b), (c), (i), (j) or (k) except for the provision of necessities or to prevent the dependant from becoming or continuing to be a public charge, and shall not make an order under clause (d).

Assignment of support

(3) An order for support may be assigned to an agency referred to in subsection 33 (3).

Support order binds estate

(4) An order for support binds the estate of the person having the support obligation unless the order provides otherwise.

Indexing of support payments

(5) In an order made under clause (1) (a), the court may provide that the amount payable shall be increased annually on the order's anniversary date by the indexing factor, as defined in subsection (6), for November of the previous year.

Definition

(6) The indexing factor for a given month is the percentage change in the Consumer Price Index for Canada for prices of all items since the same month of the previous year, as published by Statistics Canada.

Domestic contract, etc., may be filed with court

35.—(1) A person who is a party to a domestic contract or paternity agreement may file the contract or agreement with the clerk of the Provincial Court (Family Division) or of the Unified Family Court together with the person's affidavit stating that the contract or agreement is in effect and has not been set aside or varied by a court or agreement.

Effect of filing

(2) A provision for support or maintenance contained in a contract or agreement that is filed in this manner,

(a) may be enforced; and

(b) may be varied under section 37 and increased under section 38,

as if it were an order of the court where it is filed.

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Setting aside available

(3) Subsection 33 (4) (setting aside in unconscionable circumstances, etc.) applies to a contract or agreement that is filed in this manner.

Filing and enforcement available despite waiver

(4) Subsection (1) and clause (2) (a) apply despite an agreement to the contrary.

Existing contracts, etc.

(5) Subsections (1) and (2) also apply to contracts and agreements made before this Act comes into force.

Existing arrears

(6) Clause (2) (a) also applies to arrears accrued before this Act comes into force.

Effect of divorce proceeding R.S.C. 1970, c. D-8

36.—(1) When a divorce proceeding is commenced under the *Divorce Act* (Canada), an application for support under this Part that has not been adjudicated is stayed, unless the court orders otherwise.

Arrears may be included in order under R.S.C. 1970, c. D-8

(2) The court that deals with a divorce proceeding under the *Divorce Act* (Canada) may determine the amount of arrears owing under an order for support made under this Part and make an order respecting that amount at the same time as it makes an order under the *Divorce Act* (Canada).

Idem

(3) If a marriage is terminated by divorce or judgment of nullity and the question of support is not adjudicated in the divorce or nullity proceedings, an order for support made under this Part continues in force according to its terms.

Application for variation

37.—(1) A dependant or respondent named in an order made or confirmed under this Part, the respondent's personal representative, or an agency referred to in subsection 33 (3), may apply to the court for variation of the order.

Powers of court

(2) If the court is satisfied that there has been a material change in the dependant's or respondent's circumstances or that evidence not available on the previous hearing has become available, the court may discharge, vary or suspend a term of the order, prospectively or retroactively, relieve the respondent from the payment of part or all of the arrears or any interest due on them and make any other order under section 34 that the court considers appropriate in the circumstances referred to in section 33.

Limitation on applications for variation

(3) No application for variation shall be made within six months after the making of the order for support or the disposition of another application for variation in respect of the same order, except by leave of the court.

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Application to have existing order indexed

38.—(1) If an order made or confirmed under this Part is not indexed under subsection 34 (5), the dependant, or an agency referred to in subsection 33 (3), may apply to the court to have the order indexed in accordance with subsection 34 (5).

Power of court

(2) The court shall, unless the respondent shows that his or her income, assets and means have not increased sufficiently to permit the increase, order that the amount payable be increased by the indexing factor, as defined in subsection 34 (6), for November of the year before the year in which the application is made and be increased in the same way annually thereafter on the anniversary date of the order under this section.

Existing orders

39. Sections 36 to 38 also apply to orders for maintenance or alimony made before the 31st day of March, 1978 or in proceedings commenced before the 31st day of March, 1978 and to orders for support made under Part II of the *Family Law Reform Act*.

R.S.O. 1980, c. 152

Restraining orders

40. The court may, on application, make an interim or final order restraining the depletion of a spouse's property that would impair or defeat a claim under this Part.

Financial statement

41. In an application under section 33 or 37, each party shall serve on the other and file with the court a financial statement verified by oath or statutory declaration in the manner and form prescribed by the rules of the court.

Order for return by employer

42.—(1) In an application under section 33 or 37, the court may order the employer of a party to the application to make a written return to the court showing the party's wages or other remuneration during the preceding twelve months.

Return as evidence

(2) A return purporting to be signed by the employer may be received in evidence as *prima facie* proof of its contents.

Order for access to information

(3) The court may, on motion, make an order under subsection (4) if it appears to the court that, in order to make an application under section 33 or 37, the moving party needs to learn or confirm the proposed respondent's whereabouts.

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Idem

(4) The order shall require the person or public body to whom it is directed to provide the court or the moving party with any information that is shown on a record in the person's or public body's possession or control and that indicates the proposed respondent's place of employment, address or location.

Crown bound

(5) This section binds the Crown in right of Ontario.

Arrest of absconding debtor

43.—(1) If an application is made under section 33 or 37 and the court is satisfied that the respondent is about to leave Ontario and that there are reasonable grounds for believing that the respondent intends to evade his or her responsibilities under this Act, the court may issue a warrant for the respondent's arrest for the purpose of bringing him or her before the court.

Bail
R.S.O. 1980, c. 400

(2) Section 134 (interim release by justice of the peace) of the *Provincial Offences Act* applies, with necessary modifications, to an arrest under the warrant.

Provisional orders

44.—(1) In an application under section 33 or 37 in the Provincial Court (Family Division) or the Unified Family Court, the court shall proceed under this section, whether or not the respondent in the application files a financial statement, if,

(a) the respondent fails to appear;

(b) it appears to the court that the respondent resides in a locality in Ontario that is more than 150 kilometres away from the place where the court sits; and

(c) the court is of the opinion, in the circumstances of the case, that the issues can be adequately determined by proceeding under this section.

Idem

(2) If the court determines that it would be proper to make a final order, were it not for the respondent's failure to appear, the court shall make an order for support that is provisional only and has no effect until it is confirmed by the Provincial Court (Family Division) or the Unified Family Court sitting nearest the place where the respondent resides.

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Transmission for hearing

(3) The court that makes a provisional order shall send to the court in the locality in which the respondent resides copies of such documents and records, certified in such manner, as are prescribed by the rules of the court.

Show cause

(4) The court to which the documents and records are sent shall cause them to be served upon the respondent, together with a notice to file with the court the financial statement required by section 41, and to appear and show cause why the provisional order should not be confirmed.

Confirmation of order

(5) At the hearing, the respondent may raise any defence that might have been raised in the original proceeding, but if the respondent fails to satisfy the court that the order ought not to be confirmed, the court may confirm the order without variation or with the variation that the court considers proper having regard to all the evidence.

Adjournment for further evidence

(6) If the respondent appears before the court and satisfies the court that for the purpose of a defence or for the taking of further evidence or otherwise it is necessary to remit the case to the court where the applicant resides, the court may remit the case and adjourn the proceeding for that purpose.

Where order not confirmed

(7) If the respondent appears before the court and the court, having regard to all the evidence, is of the opinion that the order ought not to be confirmed, the court shall remit the case to the court sitting where the order was made with a statement of the reasons for doing so, and the court sitting where the order was made shall dispose of the application in accordance with the statement.

Certificates as evidence

(8) A certificate certifying copies of documents or records for the purpose of this section and purporting to be signed by the clerk of the court is, without proof of the clerk's office or signature, admissible in evidence in a court to which it is transmitted under this section as *prima facie* proof of the copy's authenticity.

Right of appeal

(9) No appeal lies from a provisional order made under this section, but a person bound by an order confirmed under this section has the same right of appeal as he or she would have had if the order had been made under section 34.

Pledging credit for necessities

45.—(1) During cohabitation, a spouse has authority to render himself or herself and his or her spouse jointly and severally liable to a third party for necessities of life, unless the spouse has notified the third party that he or she has withdrawn the authority.

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Liability for necessities of minor

(2) If a person is entitled to recover against a minor in respect of the provision of necessities for the minor, every parent who has an obligation to support the minor is liable for them jointly and severally with the minor.

Recovery between persons jointly liable

(3) If persons are jointly and severally liable under this section, their liability to each other shall be determined in accordance with their obligation to provide support.

Common law supplanted

(4) This section applies in place of the rules of common law by which a wife may pledge her husband's credit.

Order restraining harassment

46.—(1) On application, a court may make an interim or final order restraining the applicant's spouse or former spouse from molesting, annoying or harassing the applicant or children in the applicant's lawful custody, or from communicating with the applicant or children, except as the order provides, and may require the applicant's spouse or former spouse to enter into the recognizance that the court considers appropriate.

Offence

(2) A person who contravenes a restraining order is guilty of an offence and upon conviction is liable,

(a) in the case of a first offence, to a fine of not more than $1,000 or to imprisonment for a term of not more than three months, or to both; and

(b) in the case of a second or subsequent offence, to a fine of not more than $10,000 or to imprisonment for a term of not more than two years, or to both.

Arrest without warrant

(3) A police officer may arrest without warrant a person the police officer believes on reasonable and probable grounds to have contravened a restraining order.

Existing orders

R.S.O. 1980, c. 152

(4) Subsections (2) and (3) also apply in respect of contraventions, committed after this Act comes into force, of restraining orders made under Part II of the *Family Law Reform Act*.

Application for custody

R.S.O. 1980, c. 68

47. The court may direct that an application for support stand over until an application for custody under the *Children's Law Reform Act* has been determined.

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Appeal from Provincial Court (Family Division)

48. An appeal lies from an order of the Provincial Court (Family Division) under this Part to the District Court.

Contempt of orders of Provincial Court (Family Division)

49.—(1) In addition to its powers in respect of contempt, the Provincial Court (Family Division) may punish by fine or imprisonment, or by both, any wilful contempt of or resistance to its process, rules or orders under this Act, but the fine shall not exceed $1,000 nor shall the imprisonment exceed ninety days.

Conditions of imprisonment

(2) An order for imprisonment under subsection (1) may be conditional upon default in the performance of a condition set out in the order and may provide for the imprisonment to be served intermittently.

Limitation

50.—(1) No action or application for an order for the support of a spouse shall be brought under this Part after two years from the day the spouses separate.

Idem

(2) If the spouses provided for support on separation in a domestic contract, subsection (1) does not apply and no action or application for an order for the support of a spouse shall be brought after default under the contract has subsisted for two years.

PART IV

DOMESTIC CONTRACTS

Definitions

51. In this Part,

"accord de cohabitation" "cohabitation agreement" means an agreement entered into under section 53;

"contrat familial" "domestic contract" means a marriage contract, separation agreement or cohabitation agreement;

"contrat de mariage" "marriage contract" means an agreement entered into under section 52;

"accord de paternité" "paternity agreement" means an agreement entered into under section 59;

"accord de séparation" "separation agreement" means an agreement entered into under section 54.

Marriage contracts

52.—(1) A man and a woman who are married to each other or intend to marry may enter into an agreement in which they agree on their respective rights and obligations under the marriage or on separation, on the annulment or dissolution of the marriage or on death, including,

(a) ownership in or division of property;

(b) support obligations;

(c) the right to direct the education and moral training of their children, but not the right to custody of or access to their children; and

(d) any other matter in the settlement of their affairs.

Rights re matrimonial home excepted

(2) A provision in a marriage contract purporting to limit a spouse's rights under Part II (Matrimonial Home) is unenforceable.

Cohabitation agreements

53.—(1) A man and a woman who are cohabiting or intend to cohabit and who are not married to each other may enter into an agreement in which they agree on their respective rights and obligations during cohabitation, or on ceasing to cohabit or on death, including,

(a) ownership in or division of property;

(b) support obligations;

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(c) the right to direct the education and moral training of their children, but not the right to custody of or access to their children; and

(d) any other matter in the settlement of their affairs.

Effect of marriage on agreement

(2) If the parties to a cohabitation agreement marry each other, the agreement shall be deemed to be a marriage contract.

Separation agreements

54. A man and a woman who cohabited and are living separate and apart may enter into an agreement in which they agree on their respective rights and obligations, including,

(a) ownership in or division of property;

(b) support obligations;

(c) the right to direct the education and moral training of their children;

(d) the right to custody of and access to their children; and

(e) any other matter in the settlement of their affairs.

Form of contract

55.—(1) A domestic contract and an agreement to amend or rescind a domestic contract are unenforceable unless made in writing, signed by the parties and witnessed.

Capacity of minor

(2) A minor has capacity to enter into a domestic contract, subject to the approval of the court, which may be given before or after the minor enters into the contract.

Agreement on behalf of mentally incompetent person

(3) If a person is mentally incompetent,

(a) the person's committee, if any, unless the person's spouse is the committee;

(b) in all other cases, the Public Trustee,

may enter into a domestic contract or give any waiver or consent under this Act on the mentally incompetent person's behalf, subject to the prior approval of the court.

Contracts subject to best interests of child

56.—(1) In the determination of a matter respecting the support, education, moral training or custody of or access to a child, the court may disregard any provision of a domestic contract pertaining to the matter where, in the opinion of the court, to do so is in the best interests of the child.

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Dum casta clauses

(2) A provision in a domestic contract to take effect on separation whereby any right of a party is dependent upon remaining chaste is unenforceable, but this subsection shall not be construed to affect a contingency upon marriage or cohabitation with another.

Idem

(3) A provision in a domestic contract made before this section comes into force whereby any right of a party is dependent upon remaining chaste shall be given effect as a contingency upon marriage or cohabitation with another.

Setting aside domestic contract

(4) A court may, on application, set aside a domestic contract or a provision in it,

(a) if a party failed to disclose to the other significant assets, or significant debts or other liabilities, existing when the domestic contract was made;

(b) if a party did not understand the nature or consequences of the domestic contract; or

(c) otherwise in accordance with the law of contract.

Barriers to remarriage

(5) The court may, on application, set aside all or part of a separation agreement or settlement, if the court is satisfied that the removal by one spouse of barriers that would prevent the other spouse's remarriage within that spouse's faith was a consideration in the making of the agreement or settlement.

Idem

(6) Subsection (5) also applies to consent orders, releases, notices of discontinuance and abandonment and other written or oral arrangements.

Application of subss. (4, 5, 6)

(7) Subsections (4), (5) and (6) apply despite any agreement to the contrary.

Rights of donors of gifts

57. If a domestic contract provides that specific gifts made to one or both parties may not be disposed of or encumbered without the consent of the donor, the donor shall be deemed to be a party to the contract for the purpose of enforcement or amendment of the provision.

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Contracts made outside Ontario

58. The manner and formalities of making a domestic contract and its essential validity and effect are governed by the proper law of the contract, except that,

(a) a contract of which the proper law is that of a jurisdiction other than Ontario is also valid and enforceable in Ontario if entered into in accordance with Ontario's internal law;

(b) subsection 33 (4) (setting aside provision for support or waiver) and section 56 apply in Ontario to contracts for which the proper law is that of a jurisdiction other than Ontario; and

(c) a provision in a marriage contract or cohabitation agreement respecting the right to custody of or access to children is not enforceable in Ontario.

Paternity agreements

59.—(1) If a man and a woman who are not spouses enter into an agreement for,

(a) the payment of the expenses of a child's prenatal care and birth;

(b) support of a child; or

(c) funeral expenses of the child or mother,

on the application of a party, or a children's aid society, to the Provincial Court (Family Division) or the Unified Family Court, the court may incorporate the agreement in an order, and Part III (Support Obligations) applies to the order in the same manner as if it were an order made under that Part.

Absconding respondent

(2) If an application is made under subsection (1) and a judge of the court is satisfied that the respondent is about to leave Ontario and that there are reasonable grounds to believe that the respondent intends to evade his or her responsibilities under the agreement, the judge may issue a warrant in the form prescribed by the rules of the court for the respondent's arrest.

Bail

R.S.O. 1980, c. 400

(3) Section 134 (interim release by justice of the peace) of the *Provincial Offences Act* applies, with necessary modifications, to an arrest under the warrant.

Capacity of minor

(4) A minor has capacity to enter into an agreement under subsection (1) that is approved by the court, whether the

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approval is given before or after the minor enters into the agreement.

Application to existing agreements

(5) This section applies to paternity agreements that were made before the day this Act comes into force.

Application of Act to existing contracts

60.—(1) A domestic contract validly made before the day this Act comes into force shall be deemed to be a domestic contract for the purposes of this Act.

Contracts entered into before coming into force of Act

(2) If a domestic contract was entered into before the day this Act comes into force and the contract or any part would have been valid if entered into on or after that day, the contract or part is not invalid for the reason only that it was entered into before that day.

Idem

(3) If property is transferred, under an agreement or understanding reached before the 31st day of March, 1978, between spouses who are living separate and apart, the transfer is effective as if made under a domestic contract.

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PART V

DEPENDANTS' CLAIM FOR DAMAGES

Right of dependants to sue in tort

61.—(1) If a person is injured or killed by the fault or neglect of another under circumstances where the person is entitled to recover damages, or would have been entitled if not killed, the spouse, as defined in Part III (Support Obligations), children, grandchildren, parents, grandparents, brothers and sisters of the person are entitled to recover their pecuniary loss resulting from the injury or death from the person from whom the person injured or killed is entitled to recover or would have been entitled if not killed, and to maintain an action for the purpose in a court of competent jurisdiction.

Damages in case of injury

(2) The damages recoverable in a claim under subsection (1) may include,

(a) actual expenses reasonably incurred for the benefit of the person injured or killed;

(b) actual funeral expenses reasonably incurred;

(c) a reasonable allowance for travel expenses actually incurred in visiting the person during his or her treatment or recovery;

(d) where, as a result of the injury, the claimant provides nursing, housekeeping or other services for the person, a reasonable allowance for loss of income or the value of the services; and

(e) an amount to compensate for the loss of guidance, care and companionship that the claimant might reasonably have expected to receive from the person if the injury or death had not occurred.

Contributory negligence

(3) In an action under subsection (1), the right to damages is subject to any apportionment of damages due to contributory fault or neglect of the person who was injured or killed.

Limitations of actions

(4) No action shall be brought under subsection (1) after the expiration of two years from the time the cause of action arose.

Offer to settle for global sum

62.—(1) The defendant may make an offer to settle for one sum of money as compensation for his or her fault or neglect to all plaintiffs, without specifying the shares into which it is to be divided.

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Apportionment

(2) If the offer is accepted and the compensation has not been otherwise apportioned, the court may, on motion, apportion it among the plaintiffs.

Payment before apportionment

(3) The court may direct payment from the fund before apportionment.

Payment may be postponed

(4) The court may postpone the distribution of money to which minors are entitled.

Assessment of damages, insurance

63. In assessing damages in an action brought under this Part, the court shall not take into account any sum paid or payable as a result of the death or injury under a contract of insurance.

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PART VI

AMENDMENTS TO THE COMMON LAW

Unity of legal personality abolished

64.—(1) For all purposes of the law of Ontario, a married person has a legal personality that is independent, separate and distinct from that of his or her spouse.

Capacity of married person

(2) A married person has and shall be accorded legal capacity for all purposes and in all respects as if he or she were an unmarried person and, in particular, has the same right of action in tort against his or her spouse as if they were not married.

Purpose of subss. (1, 2)

(3) The purpose of subsections (1) and (2) is to make the same law apply, and apply equally, to married men and married women and to remove any difference in it resulting from any common law rule or doctrine.

Actions between parent and child

65. No person is disentitled from bringing an action or other proceeding against another for the reason only that they are parent and child.

Recovery for prenatal injuries

66. No person is disentitled from recovering damages in respect of injuries for the reason only that the injuries were incurred before his or her birth.

Domicile of minor

67. The domicile of a person who is a minor is,

(a) if the minor habitually resides with both parents and the parents have a common domicile, that domicile;

(b) if the minor habitually resides with one parent only, that parent's domicile;

(c) if the minor resides with another person who has lawful custody of him or her, that person's domicile; or

(d) if the minor's domicile can not be determined under clause (a), (b) or (c), the jurisdiction with which the minor has the closest connection.

Parental liability for torts of child: onus of proof

68. In an action against a parent for damage to property or for personal injury or death caused by the fault or neglect of a child who is a minor, the onus of establishing that the parent exercised reasonable supervision and control over the child rests with the parent.

72

GENERAL

Regulations

69. The Lieutenant Governor in Council may make regulations respecting any matter referred to as prescribed by the regulations.

Application of ss. 5-8

70.—(1) Sections 5 to 8 apply unless,

R.S.O. 1980, c. 152

(a) an application under section 4 of the *Family Law Reform Act* was adjudicated or settled before the 4th day of June, 1985; or

(b) the first spouse's death occurs before the day this Act comes into force.

Extension of limitation period

(2) The limitation period set out in clause 7 (3) (b) does not expire until six months after this Act comes into force.

Application of Part II

(3) Part II (Matrimonial Home) applies unless a proceeding under Part III of the *Family Law Reform Act* to determine the rights between spouses in respect of the property concerned was adjudicated or settled before the 4th day of June, 1985.

Interpretation of existing contracts

(4) A separation agreement or marriage contract that is validly made before the day this Act comes into force and that excludes a spouse's property from the application of sections 4 and 8 of the *Family Law Reform Act*,

(a) shall be deemed to exclude that property from the application of section 5 of this Act; and

(b) shall be read with necessary modifications.

71.—(1) The *Family Law Reform Act*, being chapter 152 of the Revised Statutes of Ontario, 1980, except the title, subsection 27 (1) and sections 69, 70 and 71, is repealed.

(2) Subsection 27 (1) of the *Family Law Reform Act* is repealed.

(3) Section 3 of the *Children's Law Reform Amendment Act, 1982*, being chapter 20, section 179 of the *Courts of Justice Act, 1984*, being chapter 11, section 10 of the *Courts of Justice Amendment Act, 1984*, being chapter 64 and section 18 of the *Land Registration Reform Act, 1984*, being chapter 32, are repealed.

73

(4) The title to the *Family Law Reform Act* is repealed and the following substituted therefor:

DOWER AND MISCELLANEOUS ABOLITION ACT

72. Subsection 12 (2) of the *Ontario Municipal Employees Retirement System Act*, being chapter 348 of the Revised Statutes of Ontario, 1980, is repealed and the following substituted therefor:

Application of subs. (1)

(2) Notwithstanding subsection (1), payment to a person out of the Fund is subject to execution, seizure or attachment in satisfaction of an order for support or maintenance enforceable in Ontario.

73. Subsection 27 (3) of the *Pension Benefits Act*, being chapter 373 of the Revised Statutes of Ontario, 1980, as enacted by the Statutes of Ontario, 1983, chapter 2, section 5, is repealed.

74. Subsection 34 (4) of the *Public Service Superannuation Act*, being chapter 419 of the Revised Statutes of Ontario, 1980, as enacted by the Statutes of Ontario, 1984, chapter 22, section 15, is repealed.

75. Subsection 43 (3) of the *Teachers' Superannuation Act, 1983*, being chapter 84, is repealed.

Commencement

76. This Act comes into force on a day to be named by proclamation of the Lieutenant Governor.

Short title

77. The short title of this Act is the *Family Law Act, 1986*.

(Draft Revision)

Prince Edward Island

FAMILY LAW ACT

BE IT ENACTED by the Lieutenant Governor and Legislative Assembly of the Province of Prince Edward Island as follows:

Definitions

1. In this Act

child

(a) "child" means a child born within or outside marriage, an adopted child subject to sections 18 and 26 of the Adoption Act, R.S.P.E.I. 1988, Cap. A-4 (which relate to the effect of adoption), and includes a person whom the parent has demonstrated a settled intention to treat as a child of his or her family, but does not include a child placed in a foster home by a person having lawful custody;

cohabit

(b) "cohabit" means to live together in a conjugal relationship, whether within or outside marriage;

court

(c) "court" means the Family Section of the Trial Division of the Supreme Court of Prince Edward Island;

domestic contract

(d) "domestic contract" means a domestic contract as defined in Part IV;

parent

(e) "parent" means the father or mother of a child, and includes a person who has demonstrated a settled intention to treat a child as a child of his or her family, but does not include a person in whose home a child was placed as a foster child by a person having lawful custody;

spouse

(f) "spouse" means either of a man and woman who

(i) are married to each other,

(ii) are married to each other by a marriage that is voidable and has not been voided by a judgment of nullity,

(iii) have gone through a form of marriage with each other, in good faith, that is void and are cohabiting or have cohabited within the preceding year, or

(iv) is the widow or widower of a deceased spouse.*

*Note: underlining indicates a new or substantially reworded portion of the Act (except the title of an Act or legal-latin maxim which are by custom underlined)

Priority among applications

2. (1) Where, in an application under any provision of this Act, it appears to the court that for the appropriate determination of the affairs of the spouses it is necessary or desirable to have other matters first or simultaneously determined, the court may direct that the application stand over until such other applications are brought or determined as the court considers appropriate.

Procedure

(2) An application under this Act may be made in the manner prescribed by the rules of court or in another proceeding.

Capacity of minors

(3) A minor who is a spouse has capacity to commence, conduct and defend a proceeding under this Act without the intervention of a next friend or litigation guardian and to give any consent required or authorized by this Act.

Extension of time for filing

(4) The court may extend the time for bringing an application under this Act where the court is satisfied that

(a) there are prima facie grounds for relief;

(b) relief is unavailable because of delay that has been incurred in good faith; and

(c) no substantial prejudice or hardship will result to any person affected by reason of the delay.

Excluding public from hearing

(5) The court may exclude the public from a hearing, or any part thereof, where, in the opinion of the presiding judge, the desirability of protecting against the consequences of possible disclosure of intimate financial or personal matters outweighs the desirability of holding the hearing in public and the court may by order prohibit the publication of any matter connected with the application or given in evidence at the hearing.

Consent orders

(6) Upon the consent of the parties in an application under this Act, the court may make any order that the court is otherwise empowered

to make by this Act, subject to the duty of the court to have regard to the best interests of children affected.

Domestic contract included in order

(7) The court may incorporate in an order made under this Act upon an ex-parte application of either of the parties to a domestic contract any provision contained in the domestic contract that the court is otherwise empowered to order where a term of the domestic contract is that such provision be incorporated in an order of the court.

Act subject to contract

(8) Where a domestic contract makes provision in respect of a matter that is provided for in this Act, the contract prevails except as otherwise provided in this Act.

Effect of orders on third parties

(9) Where an order made under this Act affects real property, the order does not affect the acquisition of an interest in the real property by a person in good faith without notice of the order, unless the order is registered in the proper land registry office.

PART I

DIVISION OF NET FAMILY ASSETS

Definitions

3. In this Part

business assets

(a) "business assets" means property used or held for or in connection with

(i) the employment, trade, occupation or profession of a spouse,

(ii) the commercial or industrial activities of a spouse, and

(iii) that portion of a farm property that is not a matrimonial home;

family assets

(b) "family assets" means a matrimonial home as determined under Part III and property owned by one spouse or both spouses and ordinarily used or enjoyed by both spouses or one or more of their children while the spouses are residing together for shelter or transportation or for household, educational, recreational, social or aesthetic purposes, and includes

(i) money in an account with a chartered bank, savings office, credit union or trust company where the account is ordinarily used for shelter or transportation or for household, educational, recreational, social and aesthetic purposes,

(ii) where property owned by a corporation, partnership or trustee would, if it were owned by a spouse, be a family asset, shares in the corporation or an interest in the partnership or trust owned by the spouse having a market value equal to the value of the benefit the spouse has in respect of the property,

(iii) property over which a spouse has, either alone or in conjunction with another person, a power of appointment exercisable in favour of himself or herself, if the property would be a family asset if it were owned by the spouse,

(iv) property disposed of by a spouse but over which the spouse has, either alone or in conjuction with another person, a power to revoke the disposition or a power to consume, invoke or dispose of the property, if the property would be a family asset if it were owned by the spouse,

(v) moneys invested in Registered Retirement Savings Plans,

(vi) contributions to or funds paid into a pension plan that has not vested, or rights under a pension plan that have vested under the Pension Benefits Act including the employer's contributions,

(vii) the cash surrender value of life insurance policies,

(viii) all other assets owned by either spouse except as otherwise provided in this Act,

but does not include

(ix) business assets,

(x) property, other than a matrimonial home, that was acquired by gift or inheritance from a third person after the date of the marriage,

(xi) income from property referred to in paragraph (x), if the donor or testator has expressly stated that it is to be excluded from the spouse's family assets,

(xii) damages or a right to damages for personal injuries, nervous shock, mental distress or loss of guidance, care and companionship, or the part of a settlement that represents those damages,

(xiii) proceeds or a right to proceeds on death of a life insurance policy as defined in the Insurance Act,

(xiv) property that the spouses have agreed by a domestic contract is not to be included in the spouse's family assets;

net family assets

(c) "net family assets" means the value of all family assets as of the valuation date after deducting all debts and other liabilities incurred to acquire, preserve or maintain those family assets;

property

(d) "property" means real or personal property or any interest therein.

Division of net family assets

4. (1) Subject to subsection (5) a spouse is entitled to have the net family assets divided in equal shares by value, where

(a) a divorce is granted;

(b) a marriage is declared a nullity;

(c) the spouses are separated and there is no reasonable prospect of the resumption of cohabitation;

(d) the spouses are cohabiting and where there is a serious danger that one spouse may improvidently deplete his or her net family assets; and

(e) a spouse dies and the surviving spouse elects to obtain relief under clause 7(1)(c);

notwithstanding the ownership of the assets by the spouses as determinable for other purposes or any order under section 8.

Determination of certain matters

(2) The court may at any time, upon the application of a person who is the spouse of another, determine any matter respecting the division of net family assets between them.

Estates, effect on

(3) The rights under subsection (1) are personal as between the spouses but any application commenced under subsection (2) before or after the death of a spouse may be continued by or against the estate of the deceased spouse.

Valuation of property

(4) For the purpose of determining the value of any property which

(a) is a family asset; and

(b) was acquired by either spouse prior to the date of the marriage,

the court shall deduct from the net value of that property at the date of the hearing such sum as the court determines to be the value, at the date of the marriage, of the equity in that property owned by that spouse.

Unequal division

(5) The court may make a division of net family assets resulting in shares that are not equal where the court is of the opinion that a division of the net family assets in equal shares would be inequitable, having regard to

(a) any agreement other than a domestic contract;

(b) the duration of the period of cohabitation under the marriage;

(c) the duration of the period during which the spouses have lived separate and apart;

(d) any other circumstance relating to the acquisition, disposition, preservation, maintenance, improvement or use of property rendering it inequitable for the division of net family assets to be in equal shares.

Unreasonable impoverishment of family assets

(6) Where in the opinion of the court, a spouse has unreasonably impoverished the family assets or the result of a division of the net family assets would be inequitable in all the circumstances having regard to the considerations set out in clauses (5)(a) to (d), the court if it is satisfied that the impoverishment or inequality results from a spouse unreasonably and inequitably applying family assets to acquire, develop, improve or preserve business assets, may order the spouse or the business whose assets have been so acquired, developed, improved or preserved to make such lump sum payment as the court considers fair, reasonable and equitable compensation to the other spouse for the impoverishment of family assets or for the inequality in the division of family assets that might otherwise result.

Business assets, affect on

(7) Where in the opinion of the court, a spouse has unreasonably impoverished the family assets through gambling or other willful wasting of assets, the court may if the spouse has business assets order the spouse or business to make such lump sum payment as the court considers fair, reasonable and equitable compensation to the other spouse for the unreasonable impoverishment of the family assets.

Purpose of Part I

(8) The purpose of Part I is to recognize that inherent in the marital relationship there is mutual contribution by the spouses, whether financial or otherwise, to the family welfare, entitling each spouse to an equal division of the family assets upon termination of the marriage, subject to the equitable considerations set out in subsections (5) and (6).

Pension benefits

*5. (1) In this section

(a) pension benefit earned during the marriage means the prescribed proportion of a pension benefit earned during

(i) marriage; or

(ii) cohabitation for three years or more as husband or wife by a member of a pension plan or a former member of a pension plan and a person of the opposite sex although such persons are not married;

(b) "spouse" for the purposes of this section only, shall be defined by the Pension Benefits Act; and

(c) all other words and phrases not defined by this Act shall be as defined by the Pension Benefits Act Stats P.E.I. 19 Cap. P- .

(2) Where a member or former member is entitled to a pension benefit and

(a) a petition for divorce is filed;

(b) an application is filed for a declaration of nullity; or

(c) the member or former member and that person's spouse have been living separate and apart and there is no reasonable prospect of the resumption of cohabitation,

*Note: this is an extract from the Pension Benefits Act draft legislation introduced in 1989; the equivalent section in any similar legislation passed by the legislature would be used in the final draft of a revised P.E.I. Family Law Act.

that person's spouse may apply to the court for a division of the pension benefit earned during the marriage.

Division of pension benefits

(3) The court may, having regard to all the circumstances, order that the spouse of the member or former member shall receive one half of the pension benefit earned during the marriage as the court may order.

Consequences of court order

(4) Where, pursuant to this section, a court orders the division of a pension benefit earned during the marriage,

(a) the spouse is entitled to payment of a pension based on that division commencing on

(i) the date on which payment of a pension to the member or former member commences, or

(ii) the normal retirement date of the member or former member,

whichever is earlier;

(b) the spouse is entitled, upon the member or former member being so entitled pursuant to subsection 49(1), to require the administrator to pay the commuted value of that spouse's pension pursuant to that subsection;

(c) the estate of the spouse of the member or former member is entitled to a refund of the contributions plus interest made in respect of that spouse's proportion of the pension benefit earned during the marriage if the spouse dies before receiving the pension;

(d) a subsequent spouse of the spouse of the member or former member is not entitled to any pension benefit or other benefit under the pension plan;

(e) the pension of the spouse is not affected by the death of the member or former member;

(f) the pension of the member or former member is not affected by the death of the spouse;

(g) the administrator of the pension plan shall provide

prescribed information to the spouse.

Limits on entitlement

(5) Except as otherwise provided by the pension plan, a court order respecting the division of a pension benefit earned during the marriage does not entitle the spouse of the member or former member to other pension benefits under the plan.

Unequal division, affect on

(6) Nothing in this section precludes a division of assets pursuant to subsection 4(5) in settlement of the value to either spouse of any pension or other benefit under a pension plan which, by reason of the termination of the marriage relationship, that spouse will lose the chance of acquiring, and where there is an unequal division upon such grounds subsections 5(1) to (5) do not apply.

Business assets, affect on

6. (1) Except as provided in subsection 4(6) or in this section, business assets shall not be subject to division, encumbrance or order by a court under this Act.

Lump sum payment

(2) A lump sum payment ordered by a court against a business pursuant to subsection 4(6) shall be paid within such time period as the court may prescribe together with interest at such rate as the court may prescribe, but in the event the payment has not been made within the time so prescribed, the court on application may order the sale of such of the business assets owned by the spouse as may be required to satisfy payment of the lump sum award.

Registration of order

(3) A person in whose favour an order is granted pursuant to subsection 4(6) may make application to the court for an order directing registration in the appropriate registration office of the order granted under subsection 4(6) as a charge or encumbrance against the property of the business and the court may grant the order if it is satisfied that the assets of the business are being disposed of to a degree which leaves the business with a significantly reduced capacity to comply with

the order.

Extension of time or variation

(4) A business subject to an order made pursuant to subsection 4(6) may make application to the court to extend the period for payment or for other variation or amendment to the order and the court after hearing the parties may make such order varying, amending or dismissing the application as to the court appears fair, reasonable and equitable in the circumstances.

Sharing farm property

(5) Business assets that are part of a farm property, in the absence of a deed vesting same in the names of the spouses as joint tenants or tenants in common, shall be deemed to be shared by the spouse in whose name the farm property is registered and the non-owning spouse in the ratio of one-third interest to the non-owning spouse and two-thirds to the registered owner, but this deemed sharing may be rebutted by the non-owning spouse by proof of a contribution of labour or money or in kind equal to the contribution of the registered owner to the acquisition, maintenance, development, improvement and preservation of the business asset for which contribution compensation was not paid to the non-owning spouse, and where such proof is established to the satisfaction of the court the court may order the farm property that is the business asset to be a family asset and available for division as such.

Contribution to business assets, where

(6) Where a spouse can prove that the spouse has made a contribution in labour or money or in kind to the acquisition, maintenance, development, improvement or preservation of business assets for which the spouse did not receive compensation, the spouse may make application to the court for compensation in quantum meruit and the court may make an order compensating the applicant spouse against the spouse who owns the business assets or against the business that owns the assets, but no such application may be brought if the spouse has obtained an order under subsection (5); an order under subsection (5)

shall be a full satisfaction of the spouse's claim for contribution to the business assets.

Purpose of section

(7) An order made under this section shall not be made so as to require or result in the sale of an operating business or farm or so as to seriously impair their operation, unless there is no reasonable alternative method of satisfying an order for payment to a spouse.

Share of profits

(8) To comply with subsection (6) the court may order that one spouse pay to the other a share of the profits from the business or farm.

Sharing net family assets after death of a spouse

7. (1) Where a spouse dies having made no testamentary dispositions, or having made testamentary dispositions, the result of either of which being that the surviving spouse receives less than the spouse would be entitled to receive under this Part if the spouses were alive, the surviving spouse in addition to any other remedies that may be available to the surviving spouse at law may elect

(a) to make application for relief under the Dependants of a Deceased Person Relief Act;

(b) to obtain relief under Part IV of the Probate Act if the deceased spouse died intestate;

(c) to make application for remedy under Part I of this Act; or

(d) to take under the will;

but any such election shall be expressly stated in an application referred to in clauses (a) or (c) or in documentation related to obtaining relief under Part IV of the Probate Act and such election precludes the spouse so electing from making application under or from seeking remedy under, any of the other statutes referred to in clauses (a) to (c).

Testamentary dispositions, affect on

(2) The court, in considering an application under this section, may vary, amend or declare void any terms of a testamentary disposition

made by the deceased spouse which are contrary to the intent and spirit of this Act, and may deem the testamentary dispositions to conform with this Act for the purposes of making a division of net family assets.

Definition

(3) "Testamentary disposition" in this section includes instruments designating beneficiaries and wills.

Declaration of property

8. (1) Where an application is made under section 4, each party shall file with the court and serve upon the other a statement verified by oath or statutory declaration disclosing particulars of all property of the party in the manner and on forms prescribed by regulations.

Onus of proof

(2) In an application under section 4 the onus shall lie on the party claiming that any particular item of property is not a family asset to adduce evidence to that effect.

Order for sealing statement

(3) Where, in the opinion of the court, the public disclosure of any information required to be contained in a statement under subsection (1) would be a hardship on the person giving the statement, the court may order that the statement and any cross-examination upon it before the hearing be treated as confidential and not form part of the public record.

Statement not filed as required

(4) Where in the opinion of the court, an applicant has made reasonable efforts to obtain a statement under subsection (1) from the respondent and has been unable to obtain that statement, the court may proceed with determining the merits of the application and make an order in relation to the application in the absence of such information.

Orders re property issues

9. In an application under section 4, the court may order

(a) that the title to any specified property directed to a spouse in the division be transferred to or in trust for or vested in the spouse whether absolutely, for life or for a term of years;

(b) the partition or sale of any property;

(c) that payment be made out of the proceeds of sale to one or both spouses, and the amount thereof;

(d) that any property forming part of the share of either or both spouses be transferred to or in trust for or vested in a child to whom a spouse owes an obligation to provide support;

(e) that either or both spouses give security for the performance of any obligation imposed by the order, including a charge on property; and

(f) that either spouse pay to the other such sum as is set out in the order for the purpose of adjusting the division;

and may make such other orders or give such directions as are ancillary thereto.

Determination of property issues

10. Any person may apply to the court for the determination of any question between that person and his or her spouse or former spouse as to the ownership or right to possession of any particular property, except where an application or an order has been made respecting the property under section 4 or 9, and the court may

(a) declare the ownership or right to possession;

(b) where the property has been disposed of, order payment in compensation for the interest of either party;

(c) order that the property be partitioned or sold for the purpose of realizing the interest therein; and

(d) order that either or both spouses give security for the performance of any obligation imposed by the order including a charge on property;

and may make such other orders or give such directions as are ancillary thereto.

Valuation dates

11. (1) For the purposes of valuing the interests that the spouses have in property under Part I the date of valuation that shall be used in computations under this Part shall be the earliest of the following dates:

(a) the date the spouses separate and there is no reasonable prospect that they will resume cohabitation;

(b) the date a divorce is granted;

(c) the date the marriage is declared a nullity;

(d) the date one of the spouses commences an application related to an allegation of unreasonable impoverishment of assets that is subsequently granted; and

(e) the date before the date on which one of the spouses dies leaving the other spouse surviving.

Time effective

(2) When a value is to be calculated as of a given date, it shall be calculated as of the close of business on that date.

Interim orders for preservation

12. In or pending an application under section 4, 10 or 11, the court may make such interim order as it considers necessary for restraining the dissipation of the property and for the possession, delivering up, safe-keeping and preservation of the property.

Order for sale of property

13. Where the court orders security for the performance of any obligation under this Part or charges a property therewith, the court may, upon application and notice to all persons having an interest in the property direct its sale for the purpose of realizing the security or charge.

Resulting trust rule applied

14. (1) The rule of law applying a presumption of advancement in questions of the ownership of property as between husband and wife is abolished and in place thereof the rule of law applying a presumption of a resulting trust shall be applied in the same manner as if they were not married, except that

(a) the fact that property is placed or taken in the name of spouses as joint tenants shall be prima facie proof that each spouse is intended to have on the severance of the joint tenancy a one-half beneficial interest in the property; and

(b) money on deposit in a chartered bank, savings office, credit union or trust company in the name of both spouses shall be deemed to be in the name of the spouses as joint tenants for the purposes of clause (a).

(2) Subsection (1) applies notwithstanding that the event giving rise to the presumption occurred before December 31, 1978.

Application of Part I

15. This Part applies notwithstanding that

(a) the spouses entered into the marriage before December 31, 1978; or

(b) the property in issue was acquired before December 31, 1978;

but does not apply in respect of property rights to which a claim has been made in a proceeding that was commenced before this Part comes into force.

Conflict of laws

16. (1) The division of family assets and the ownership as between spouses or former spouses of movable property wherever situate are governed by the internal law of the place where both spouses had their last common habitual residence or, where there is no place where the spouses had a common habitual residence, by the law of Prince Edward Island.

Idem

(2) The ownership of immovable property as between spouses or former spouses is governed by the internal law of the place where the land is situated, but where the law of Prince Edward Island is applicable respecting the divison of family assets, the value of the property may be taken into consideration for the purposes of Part I.

PART II

SUPPORT OBLIGATIONS

Definitions

dependant

spouse

17. In this Part

(a) "dependant" means a person to whom another has an obligation to provide support under this Part;

(b) "spouse" means a spouse as defined in clause 1(f) and includes either of a man and woman between whom an order for support has been made under this Part or an order for alimony or maintenance has been made before this Part comes into force and in addition includes either of a man and woman who are not married to each other and have cohabited

(i) continuously for a period of not less than three years, or

(ii) in a relationship of some permanence, if they are the natural or adoptive parents of a child.

Support obligations of spouses

18. Every spouse has an obligation to provide support for himself or herself and for the other spouse, in accordance with need, to the extent that he or she is capable of doing so.

Obligation of parent to support child

19. (1) Every parent has an obligation, to the extent the parent is capable of doing so, to provide support, in accordance with need, for his or her child

(a) who is unmarried and is under the age of eighteen years;or

(b) who is over the age of eighteen years but not over the age of twenty-two years; and

(c) who is unmarried, in financial need, and in full time attendance at a school or post-secondary educational institution.

Child withdrawn from parental control

(2) The obligation under subsection (1) does not extend to a child who, being of the age of sixteen years or over, has withdrawn from parental control.

Obligation of child to support parent

20. Every child who is not a minor has an obligation to provide support, in accordance with need, for his or her parent who has cared for and provided support for the child, to the extent that the child is capable of doing so.

Order for support

21. (1) A court may, upon application, order a person to provide support for his or her dependants and determine the amount thereof.

Who may apply

(2) An application for an order for the support of a dependant may be made by the dependant or a parent of the dependant or under subsection (3).

Idem

(3) An application for an order for the support of a dependant who is a spouse or a dependant child of the spouse may be made by

(a) the Department of Health and Social Services in the name of the Minister of Health and Social Services;

(b) an agency as defined in section 1 of the Family and Child Services Act R.S.P.E.I. 1988, Cap.F-2;

where the Department or agency is providing a benefit or assistance under the Family and Child Services Act, or the Welfare Assistance Act, R.S.P.E.I. 1988, Cap. W-3 in respect of the support of the dependant.

Court may set aside domestic contracts

(4) The court may set aside a provision for support in a domestic contact or paternity agreement and may determine and order support in an application under subsection (1) notwithstanding that the contract or agreement contains an express provision excluding the application of this section

(a) where the provision for support or the waiver of the right to support results in circumstances that are unconscionable;

(b) where the provision for support is to a spouse who qualifies for an allowance for support out of public money; or

(c) where there has been default in the payment of support under the contract or agreement.

Determination of amount

(5) In determining the amount, if any, of support in relation to need, the court shall consider all the circumstances of the parties, including

(a) the assets and means of the dependant and of the respondent and any benefit or loss of benefit under a pension plan or annuity;

(b) the capacity of the dependant to provide for his or her own support;

(c) the capacity of the respondent to provide support;

(d) the age and the physical and mental health of the dependant and of the respondent;

(e) the length of time the dependant and respondent cohabited;

(f) the needs of the dependant, in determining which the court may have regard to the accustomed standard of living while the parties resided together;

(g) the measures available for the dependant to become financially independent and the length of time and cost involved to enable the dependant to take such measures;

(h) the legal obligation of the respondent to provide support for any other person;

(i) the desirability of the dependant or respondent remaining at home to care for a child;

(j) a contribution by the dependant to the realization of the career potential of the respondent;

(k) where the dependant is a child, his or her aptitude for and reasonable prospects of obtaining an education;

(l) where the dependant is a spouse, the effect on his or her earning capacity of the responsibilities assumed during cohabitation; and

(m) any other legal right of the dependant to support other than out of public money.

Conduct of spouses

(6) The obligation to provide support for a spouse exists without regard to the conduct of either spouse, but the court may in determining the amount of support have regard to a course of conduct that is so unconscionable as to constitute a repudiation of the relationship.

Powers of court

22. (1) In an application under section 21, the court may order

(a) an amount payable periodically, whether annually or otherwise and whether for an indefinite or limited period, or until the happening of a specified event;

(b) a lump sum to be paid or held in trust;

(c) any specified property to be transferred to or in trust for or vested in the dependant, whether absolutely, for life or for a term of years;

(d) any matter authorized to be ordered under clauses 42 (1)(a) to (d) and subject to subsection 42 (3);

(e) that all or any of the moneys payable under the order be paid into court or to any other appropriate person or agency for the benefit of the dependant;

(f) the payment of support to be made in respect of any period before the date of the order;

(g) the payment to an agency referred to in subsection 21 (3) of any amount in reimbursement for a benefit or assistance referred to therein, including an amount in reimbursement for such benefit or assistance provided before the date of the order;

(h) the payment of expenses in respect of the prenatal care and birth of a child;

(i) that the obligation and liability for support continue after the death of the respondent and be a debt of his or her estate for such period as is fixed in the order;

(j) that a spouse who has a policy of life insurance as defined under Part V of the Insurance Act R.S.P.E.I. 1988, Cap. I-4 designate the other spouse or a child as the beneficiary irrevocably; and

(k) the securing of payment under the order, by a charge on property or otherwise.

Self-support an objective

(2) When hearing an application under this Part relating to the support obligations of one spouse for another the court shall consider the ability of a dependant spouse to become wholly or partially self-supporting, and if it is satisfied that the age, health, education and physical condition of the dependant spouse are such that it is reasonable to impose on the dependant spouse an obligation to either become self-supporting or to contribute to that spouse's own support, the court may in an order made under subsection (1) limit the time during which a spouse shall be obligated to support the dependant spouse or reduce the support payments either on the happening of a particular event or after the passage of a time period prescribed by the court.

Interim orders

(3) Where an application is made under section 21, the court may make such interim order as the court considers appropriate.

Order is assignable

(4) An order for support is assignable to an agency referred to in subsection 21(3).

Death, affect on order

(5) Unless an order to provide support otherwise provides, it terminates upon the death of the person having the obligation to provide support, and the liability for amounts under the order coming due and unpaid in is a debt of his or her estate.

Divorce Act action, affect of

23. (1) Where an action for divorce is commenced under the Divorce Act 1985 (Canada) Stats. Can. 1986.c.4, any application for support under this Part that has not been determined is stayed except by leave of the court.

Divorce Act, affect of

(2) Where a marriage is terminated by a divorce or declared a nullity and the question of support was not judicially determined in the divorce or nullity proceedings, an order for support made under this Part continues in force according to its terms.

Review and variation of orders

24. (1) Where an order for support has been made and where the court is satisfied that there has been a material change in the circumstances of the dependant or the respondent or evidence has become available that was not available on the previous hearing, the court may, upon the application of any person named in the order or referred to in subsection 21(3), discharge, vary or suspend any term of the order, prospectively or retroactively, relieve the respondent from the payment of part or all of the arrears or any interest due thereon and make such other order under section 22 as the court considers appropriate in the circumstances referred to in subsection 21(5).

Limitation period

(2) No application under subsection (1) shall be made within six months after the making of the order for support or the disposition of any other application under subsection (1) in respect of the same order, except by leave of the court.

Application of section

(3) This section applies to orders for support made before December 31, 1978 or in a proceeding commenced before December 31, 1978.

Interim or final order

25. In or pending an application under section 21, the court may make such interim or final order as it considers necessary for restraining the disposition or wasting of assets that would impair or defeat the claim for the payment of support.

Statements of financial information

26. (1) Where an application is made under section 21 or 24 each party shall file with the court and serve upon the other a statement verified by oath or statutory declaration disclosing particulars of property and financial information.

Contents of statements

(2) The statement referred to in subsection (1) shall contain such particulars and shall be in such form as is prescribed by regulation.

Statements not filed, power of court to proceed

(3) Where in the opinion of the court an applicant has made reasonable efforts to obtain a statement of property and financial information from the respondent and has been unable to obtain that statement, the court may proceed with determining the merits of the application and make an order in relation to the application in the absence of such statement.

Sealing statements

(4) Where, in the opinion of the court, the public disclosure of any information required to be contained in a statement under subsection (1) would be a hardship on the person giving the statement, the court may order that the statement and any cross-examination upon it before the hearing be treated as confidential and not form part of the public record.

Absconding respondent or debtor

27. Where an application is made under section 21 and a judge of the court is satisfied that the respondent or debtor is about to leave the province, the judge may issue a warrant for the arrest of the respondent or debtor.

Access to records

28. (1) Where it appears to the court that for the purpose of bringing an application under this Part the proposed applicant or person in whose favour the order is made has need to learn or confirm the whereabouts of the proposed respondent or person against whom the order is made, the court may order any person or public agency to provide the court with such particulars of the address as are contained in the records in his or its custody and the person or agency shall provide to the court such particulars as he or it is able to provide.

Section binds Crown

(2) This section binds the Crown in right of the province.

Realization of security

29. Where a court orders security for the payment of support under this Part or charges property therewith, the court may, upon application and notice to all persons having an interest in the property, direct its sale for the purpose of realizing the security or charge.

Pledging credit for necessaries

30. (1) During cohabitation, a spouse has authority to render himself or herself and his or her spouse jointly and severally liable to a third party for necessaries of life, except where the spouse has notified the third party that he or she has withdrawn the authority.

Liability for necessaries of minor

(2) Where a person is entitled to recover against a minor in respect of the provision of necessaries for the minor, each parent who has an obligation to support the minor is liable therefor jointly and severally with the minor.

Recovery between persons jointly liable

(3) Where persons are jointly and severally liable under subsection (2), their liability shall be determined in accordance with their obligation to provide support.

Common law rule replaced

(4) The provisions of this section apply in place of the rules of common law by which a wife may pledge the credit of her husband.

Restraining order

31. Upon application, a court may make an order restraining the spouse or former spouse of the applicant from molesting, annoying or harassing the applicant or children in the lawful custody of the applicant and may require the spouse of the applicant to enter into such recognizance as the court considers appropriate.

Joinder of actions

32. An application for custody or access under the Custody Jurisdiction and Enforcement Act R.S.P.E.I. 1988, Cap. C-33 may be joined with an application under this Act, but the court may direct that an application for support stand over until an application for custody has been determined.

Appeal

33. An appeal lies from an order of the Family Section under this Part to the Appeal Division.

Contempt of court

34. (1) In addition to its powers in respect of contempt, the court may punish by fine or imprisonment, or by both, any wilful contempt of or resistance to its process, rules or orders under this Act, but the fine shall not in any case exceed $2,000 nor shall the imprisonment exceed three months.

Imprisonment

(2) An order for imprisonment under subsection (1) may be made conditional upon default in the performance of a condition set out in the order and may provide for the imprisonments to be served intermittently.

PART III
MATRIMONIAL HOME

Definition

35. In this Part "property" means real or personal property, and includes a leasehold interest therein.

Matrimonial home

36. (1) Property in which a married person has an interest and that is or has been occupied by the married person and his or her spouse as their family residence is their matrimonial home.

Idem

(2) Subsection (1) applies notwithstanding that its application results in more than one matrimonial home.

Ownership of shares

(3) The ownership of a share or shares, or of an interest in a share or shares, of a corporation entitling the owner to the occupation of a housing unit owned by the corporation shall be deemed to be an interest in the unit for the purposes of subsection (1).

Mixed uses, part matrimonial home

(4) Where property that includes a matrimonial home is normally used for a purpose other than residential only, the matrimonial home is only such portion of the property as may reasonably be regarded as necessary to the use and enjoyment of the residence.

Right to possession

37. (1) A spouse is equally entitled to any right of possession of the other spouse in a matrimonial home.

Affect of death on right

(2) Subject to an order of the court under this or any other Act, a right of a spouse to possession by virtue of subsection (1) ceases upon the spouse ceasing to be a spouse.

Designation of property

38. (1) Both spouses may, by instrument in the form prescribed by the regulations, designate any property that is a matrimonial home and, upon

the registration of the instrument and while there is a designation made by the spouses under this subsection that is not cancelled, any other property that would qualify as a matrimonial home under section 36 and that is not similary designated ceases to be a matrimonial home.

Property included

(2) The property that is designated as a matrimonial home under subsection (1) may include any property contiguous to the matrimonial home that is included in the legal description of that property.

Cancellation of designation

(3) The designation of a matrimonial home under subsection (1) is cancelled upon the registration of

(a) an instrument in the form prescribed by the regulations executed by both spouses;

(b) a final judgment of divorce or judgment of nullity; or

(c) an order under section 42 cancelling the designation;

in the proper land registry office.

Affect of cancellation

(4) Upon the cancellation of the designation of a property under subsection (3), the property ceases to be a matrimonial home under section 36.

Idem

(5) Upon there ceasing to be a designation under subsection (1), section 36 applies in respect of property that is a matrimonial home.

Disposal of matrimonial home

39. (1) No spouse shall dispose of or encumber any interest in a matrimonial home unless

(a) the other spouse joins in the instrument or consents to the transaction;

(b) the other spouse has released all rights under this Part by a separation agreement;

(c) the transaction is authorized by court order or an order has been made releasing the property as a matrimonial home; or

(d) the property is not designated as a matrimonial home under

section 38 and an instrument designating another property as a matrimonial home of the spouses is registered under section 38 and has not been cancelled.

Setting aside disposal of matrimonial home

(2) Where a spouse disposes of or encumbers an interest in a matrimonial home in contravention of subsection (1), the transaction may be set aside on an application under section 41 unless the person holding the interest or encumbrance at the time of the application acquired it for value, in good faith and without notice that the property was at the time of the disposition, agreement or encumbrance a matrimonial home.

Affidavit of person disposing of matrimonial home

(3) For the purposes of subsection (2) an affidavit of the person making the disposition or encumbrance

(a) verifying that he or she is not, or was not, a spouse at the time of the disposition or encumbrance;

(b) verifying that the other spouse has released all rights under this Part by a separation agreement;

(c) verifying that the property has never been occupied by the person and his or her spouse as their matrimonial home; or

(d) where the property is not designated under section 38, verifying that an instrument designating another property as a matrimonial home of the person and his or her spouse is registered under section 38 and not cancelled,

shall, in the absence of actual notice by a spouse to the contrary, be deemed to be sufficient proof that the property is not a matrimonial home.

Application of section

(4) This section does not apply to the acquisition of an interest in property by operation of law.

Rights of both spouses re forfeiture, seizure etc. of property

40. (1) Where a person is proceeding to realize upon a lien, encumbrance or execution or exercises a forfeiture against property that

. is a matrimonial home, the spouse who has a right of possession by virtue of section 37 has the same right of redemption or relief against forfeiture as the other spouse has and is entitled to any notice respecting the claim and its enforcement or realization to which the other spouse is entitled.

Service of notice

(2) Any notice to which a spouse is entitled by virtue of subsection (1) shall be deemed to be sufficiently given if served or given personally or by registered mail addressed to the person to whom notice is to be given at his or her usual or latest known address or, where none, the address of the matrimonial home, and, where notice is served or given by mail, the service shall be deemed to have been made on the fifth day after the day of mailing.

Effect of payments made by spouse

(3) Where a spouse makes any payment by way of or on account of redemption or relief against forfeiture under the right conferred by subsection (1), the payment shall be applied in satisfaction of the claim giving rise to the lien, encumbrance, execution or forfeiture.

Powers of court re matrimonial homes

41. The court may, on the application of a spouse or person having an interest in property, by order

(a) determine whether or not property is the matrimonial home and, if so, its extent;

(b) authorize the disposition or encumbrance of the matrimonial home where the court finds that the spouse whose consent is required

(i) cannot be found or is not available,

(ii) is not capable of giving or withholding consent, or

(iii) is unreasonably withholding consent,

subject to such terms and conditions including provision of other comparable accommodation or payment in place thereof as the court considers appropriate;

(c) dispense with any notice required to be given under section 40 ; and

(d) direct the setting aside of any transaction disposing of or encumbering an interest in the matrimonial home contrary to subsection 39(1) and the revesting of the interest or any part of the interest upon such terms and subject to such conditions as the court considers appropriate.

Order for possession of matrimonial home

42. (1) Notwithstanding the ownership of a matrimonial home and its contents, and notwithstanding section 37, the court on application may by order

(a) direct that one spouse be given exclusive possession of a matrimonial home or part thereof for life or for such lesser period as the court directs and release any other property that is a matrimonial home from the application of this Part;

(b) direct a spouse to whom exclusive possession of a matrimonial home is given to pay such periodic payments to the other spouse as is prescribed in the order;

(c) direct that the contents of a matrimonial home, or any part thereof, remain in the home for the use of the person given possession;

(d) fix the obligation to pay financing costs related to the matrimonial home, to repair and maintain the matrimonial home or to pay other liabilities arising in respect thereof;

(e) authorize the disposition or encumbrance of the interest of a spouse in a matrimonial home subject to the right to exclusive possession of the other spouse as ordered; and

(f) where a false affidavit is given under subsection 39(3), direct

(i) the person who swore the affidavit, or

(ii) any person who knew at the time it was sworn that the affidavit was false and who thereafter conveyed the property,

to substitute other real property for the matrimonial home or direct such person to set aside money or security to stand in place thereof subject to such terms and conditions as the court considers appropriate.

Order for temporary relief

(2) An order may be made under subsection (1) for temporary relief or pending the bringing or disposition of another application under this Act.

Order for exclusive possession

(3) An order under subsection (1) for exclusive possession may be made only if in the opinion of the court, other provision for shelter is not adequate in the circumstances or it is in the best interests of a child to do so.

Variation for material change of circumstances

43. (1) Upon the application of a person named in an order made under clause 42(1)(a), (b), (c) or (d) or the personal representative of that person and where the court is satisfied that there has been a material change in circumstances, the court may discharge, vary or suspend the order.

Variation where conditions inappropriate

(2) Upon the application of a person who is subject to terms and conditions imposed in an order made under clause 41(b) or his personal representative and where the court is satisfied that the terms and conditions are no longer appropriate, the court may discharge, vary or suspend the terms and conditions.

Interim orders

44. In an application under this Part, the court may make such interim order as it considers necessary for the delivering up, safe-keeping and preservation of the matrimonial home or its contents.

Order registrable

45. An order made under this Part is registrable against land under the Registry Act R.S.P.E.I. 1988, Cap. R-10.

Location of homes

46. (1) This Part applies to matrimonial homes that are situated in the province.

Application of Part

(2) This Part applies notwithstanding that

(a) the spouses entered into the marriage before this Part came into force on December 31, 1978; or

(b) the matrimonial home was acquired before December 31, 1978.

but does not apply to proceedings respecting possession of a matrimonial home that were commenced before December 31, 1978.

PART IV
DOMESTIC CONTRACTS

Definitions

47. In this Part

cohabitation agreement

(a) "cohabitation agreement" means an agreement entered into under section 49;

domestic contract

(b) "domestic contract" means a marriage contract, separation agreement or cohabitation agreement;

marriage contract

(c) "marriage contract" means an agreement entered into under section 48;

separation agreement

(d) "separation agreement" means an agreement entered into under section 50.

Marriage contracts

48. (1) Two persons may enter into an agreement, before their marriage or during their marriage while cohabiting, in which they agree on their respective rights and obligations under the marriage or upon separation or the annulment or dissolution of the marriage or upon death, including

(a) ownership in or division of property;

(b) support obligations;

(c) the right to direct the education and moral training of their children, but not the right to custody of or access to their children; and

(d) any other matter in the settlement of their affairs.

Certain provisions void

(2) Any provision in a marriage contract purporting to limit the rights of a spouse under Part III is void.

Cohabitation agreements

49. (1) A man and a woman who are cohabiting and not married to one another may enter into an agreement in which they agree on their respective rights and obligations during cohabitation, or upon ceasing to cohabit or death, including

(a) ownership in or division of property;

(b) support obligations;

(c) the right to direct the education and moral training of their children, but not the right to custody of or access to their children; and

(d) any other matter in the settlement of their affairs.

Subsequent marriage affect of

(2) Where the parties to an agreement entered into under subsection (1) subsequently marry, the agreement shall be deemed to be a marriage contract.

Separation agreements

50. A man and woman who cohabited and are living separate and apart may enter into an agreement in which they agree on their respective rights and obligations, including

(a) ownership in or division of property;

(b) support obligations;

(c) the right to direct the education and moral training of their children;

(d) the right to custody of and access to their children; and

(e) any other matter in settlement of their affairs.

For of agreements

51. (1) A domestic contract and any agreement to amend or rescind a domestic contract are void unless made in writing and signed by the persons to be bound and witnessed but consideration is not a requisite for the validity of a domestic contract.

Contractual capacity of minors

(2) A minor who has capacity to contract marriage has capacity to enter into a marriage contract or separation agreement that is approved by the court, whether the approval is given before or after the contract or agreement is entered into.

Mentally incompetent persons

(3) Subject to the approval of the court

(a) the committee of a person who is mentally incompetent; or

(b) the Official Trustee

(i) if the Committee is the spouse of such person or

(ii) if there is no committee;

may enter into a domestic contract to give any waiver or consent under this Act on behalf of the mentally incompetent person.*

Best interests of child governs agreements

52. (1) In the determination of any matter respecting the support, education, moral training or custody of or access to a child, the court may disregard any provision of a domestic contract pertaining thereto where, in the opinion of the court, to do so is in the best interests of the child.

Validity of certain contractual provisions

(2) A provision in a separation agreement whether made before or after December 31, 1978 whereby any right of a spouse is dependent upon remaining chaste is void, but this subsection shall not be construed to affect a contingency upon remarriage or cohabitation with another.

Idem

(3) A provision in an agreement made before December 31, 1978 whereby any right of a spouse is dependent upon remaining chaste shall be given effect as a contingency upon remarriage or cohabitation with another.

Rights of certain donors ot enforce agreements

53. Where a domestic contract provides that specific gifts made to one or both parties by a third party donor are not disposable or encumberable without the consent of the donor, the donor shall be deemed to be a party to the contract for the purposes of the enforcement or any amendment of the provision.

Formalities of domestic contracts

54. The manner and formalities of making a domestic contract and its essential validity and effect are governed by the proper law of the contract, except that

(a) a contract for which the proper law is that of a jurisdiction other than Prince Edward Island, is also valid and enforceable in Prince Edward Island if entered into in accordance with the

* This section has been reworded to give greater clarity to the original wording; there is no substantive change.

internal law of Prince Edward Island;

(b) subsection 21(4) and section 52 apply in Prince Edward Island to contracts for which the proper law is that of a jurisdiction other than Prince Edward Island; and

(c) a provision in a marriage contract or cohabitation agreement for which the proper law is that of a jurisdiction other than Prince Edward Island respecting the right to custody of or access to children is not valid or enforceable in Prince Edward Island.

Paternity agreements

55. (1) Where a man and a woman who are not spouses enter into an agreement for

(a) the payment of expenses of prenatal care and birth in respect of a child;

(b) support of a child; or

(c) burial expenses of a child or mother;

on the application of a party to the agreement, the court may incorporate the agreement in an order, and Part II applies to the order in the same manner as if it were an order for support made under that Part.

Arrest of absconding respondent

(2) Where an application is made under subsection (1) and a judge of the court is satisfied that the respondent is about to leave the province, the judge may issue a warrant for the arrest of the respondent.

Capacity of minor to contract

(3) A minor who has capacity to contract marriage has capacity to enter into an agreement under subsection (1) that is approved by the court, whether the approval is given before or after the agreement is entered into.

Application of

(4) This section applies to agreements referred to in subsection (1) that were made before December 31, 1978; but parties subject to such agreements may elect to seek remedies under this Act or pursuant to such agreements.

Status of certain contracts

56. (1) A separation agreement or marriage contract validly made before December 31, 1978 shall be deemed to be a domestic contract for the purposes of this Act.

Idem

(2) Where a domestic contract is entered into in accordance with this Part before December 31, 1978 and

(a) the contract or any part would be valid if entered into after December 31, 1978 and

(b) the contract or part is entered into in contemplation of the coming into force of this Part;

the contract or part is not invalid for the reason only that it was entered into before this Part came into force.

Transitional

(3) Where pursuant to an understanding or agreement entered into before December 31, 1978 by spouses who are living separate and apart, property is transferred between them, the transfer is effective as if made pursuant to a domestic contract.

PART V
AMENDMENTS TO THE COMMON LAW AND STATUTE LAW

Independent legal personalities

57. (1) For all purposes of the law of Prince Edward Island, a married man has a legal personality that is independent, separate and distinct from that of his wife and a married woman has a legal personality that is independent, separate and distinct from that of her husband.

Capacity of married person

(2) A married person has and shall be accorded legal capacity for all purposes and in all respects as if such person were an unmarried person.

Idem

(3) Without limiting the generality of subsections (1) and (2)

(a) each of the parties to a marriage has the like right of action in tort against the other as if they were not married;

(b) a married woman is capable of acting as litigation guardian or next friend as if she were an unmarried woman;

(c) the same rule shall be applied to determine the domicile of a married woman as for a married man.

Domicile of minors

58. (1) Subject to subsection (2), a child who is a minor

(a) takes the domicile of his or her parents, where both parents have a common domicile;

(b) takes the domicile of the parent with whom the child habitually resides, where the child resides with one parent only;

(c) takes the domicile of the father, where the domicile of the child cannot be determined under clause (a) or (b); or

(d) takes the domicile of the mother, where the domicile of the child cannot be determined under clause (c).

Idem

(2) The domicile of a minor who is or has been a spouse shall be determined in the same manner as if the minor were of full age.

Regulations

59. The Lieutenant Governor in Council may make regulations respecting any matter required to be, or referred to as, prescribed by the regulations and otherwise for the purpose of giving effect to this Act.

Proclamation

60. This Act or any section thereof comes into force on such date or dates as may be prescribed by Lieutenant Governor in Council.1

CONCORDANCE
Draft #3 - February 16, 1990

113

OLD#	NEW#
1	1
2(1)	2(1)
(2)	(2)
(3)	(3)
(4)	(4)
(5)	(5)
(6)	(6)
(7)	(7)
(8)	(8)
(9)	(9)
3(a)	3(a)new
	(b)
	(c)new
(b)	(d)
4(1)	4(1)new
(2)	(2)
(3)	(3)
(4)	(4)
(5)	(5)
(6)	(6)new
	7 new
	8
(7)	9(1)new
(8)	(2)new
	(3)new
	(4)new
	(5)new
	(6)new
	10(1)new
	(2)new
	(3)new
	(4)new
	(5)new
	(6)new
	(7)new
	(8)new
	11(1)new
	(2)new
	(3)new
5(1)	12(1)
(2)	(2)
(3)	(3)
	(4)new
6	13
7	14
8(1)deleted	15(1)new
(2)deleted	(2)new
9	16
10	17

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(2)	(2)
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(2)	(2)
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15	22
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	(5)

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(2)	(2)
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OLD#	NEW#
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(2)	(2)
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(2)	(2)
(3)	(3)
55(1)	58(1)
(2)	(2)
56	59
	60 new

BACKGROUND MATERIALS

on the origin development and theory of the various family law legislative schemes in use across Canada

CONTENTS

(I) Introduction

(II) Historical Background To Reform

(III) Family Law Paradigms:
(i) separate property with judicial discretion.
(ii) community of property.
(iii) deferred sharing.

(IV) Conceptual differences between Family Law Act (Ontario) and Family Law Reform Act (Prince Edward Island)

(V) Selected features of basic family law paradigms (summarized and compared)

(VI) Valuation of family property under the Ontario Family Law Act

(VII) Legislative provision for division of family property: Ontario Family Law Act and Prince Edward Island Family Law Reform Act sections

(VIII) Concordance of Current Canadian Matrimonial Property Legislation.

Background Materials

INTRODUCTION

The goal of these materials is to provide a condensed background, a thumnail sketch, to assist in an inquiry into reforming the Family Law Reform Act of Prince Edward Island. As such, they are intended to be substantively neutral - if a reader of these materials and comments wants to be convinced that a given approach to family law is better than another, then that reader will find these materials unsatisfactory. If, on the other hand, the reader is trying to orient himself or herself prior to addressing particular "nuts and bolts" issues, then these materials may be of some use, as they were collected and commented upon for just that purpose. Included here are short readings on:

(i) the historical background to family law reform (notably the Married Women's Property Acts);
(ii) an outline of the basic family law paradigms or models currently in use;
(iii) a summary of some of the basic conceptual differences between the Family Law Act of Ontario and the Family Law Reform Act of Prince Edward Island;
(iv) a point-form summary of salient features of the division of matrimonial property division under Ontario and Prince Edward Island legislation;
(v) a concordance (ordered by section) of the current Canadian matrimonial property legislation.

Though these materials were collected with an eye to substantive neutrality, there is nevertheless a principle behind them, based on the assumption that family law reform on Prince Edward Island will take one of three basic forms, viz:

(1) an adoption, with some emendations, of the current Ontario Family Law Act. This approach to reform has the important advantage of being supported by existing jurisprudence and academic analysis. Care must be taken, of course, to avoid adopting the pitfalls of an extant system;

(2) the creation of a substantially new piece of legislation, unique to Prince Edward Island and its requirements, but adopting provisions from various provincial and possibly foreign jurisdictions. Such an approach may result in "tailor-made" legislation, but care must be taken to avoid the holus-bolus adoption of provisions from a variety of jurisdictions which could have unforeseen and negative ramifications for existing Prince Edward Island legislation; or

(3) the minor amendment of the existing Family Law Reform Act of Prince Edward Island to reflect changes in philosophy since the enactment of the legislation or to correct for problems encountered in the administration or interpretation of the current legislation.

Thus, the materials that follow tend to emphasize the Ontario experience to some degree, but not to the exclusion of other philosophies and approaches to family law reform.

The following excerpt is from Berend Hovius, Family Law: Cases, Notes and Materials, 2nd ed. (Toronto:Carswell, 1987).

(II) HISTORICAL BACKGROUND TO REFORM

"The enactment of Part I of the Family Law Reform Act, 1978 was an attempt to eliminate the perceived inequities produced by the system of separate property. The norm of separate property was itself introduced in the 19th century by a series of Married Women's Property Acts as a response to the inequities flowing from the doctrine of unity of legal personality. According to this doctrine, the husband and wife became one legal personalty upon marriage. In

effect, the common law treated the husband as that legal personality. A wife did not have an independent right to contract, to sue or be sued, or to make a will. The husband acquired the right to manage and control all the wife's freehold lands and he was entitled to the rents and profits. A wife was unable to dispose of the land without his consent. If the husband predeceased her, all rights in the freeholds were resumed by her. If she predeceased him, the husband acquired rights as life tenant by the curtesy (abolished by s. 48 of the Succession Law Reform Act, 1977) in all her freeholds of inheritance of which she died solely seised provided the husband had issue born alive by the wife capable of inheriting her freeholds. The wife's leaseholds belonged to the husband during coverture and he had absolute power to dispose of them during his lifetime. All other personalty held by the wife, except jewellery and clothing suitable to her rank, vested absolutely in the husband. He could dispose of it inter vivos or by will.

The common law compensated for the wife's loss of legal personalty in several ways. A husband was liable for his wife's ante-nuptial debts, her torts, and for debts incurred by her after marriage to procure necessaries of life. On her husband's death, a wife was entitled by virtue of her dower (abolished by s. 70 of the Family Law Reform Act, 1978) to an estate for life in a third of all the freehold estates of inheritance of which he had been seised in possession at any time during the marriage.

To some extent, the law of equity made it possible for a wife to acquire and hold property independently through the concepts of a married woman's separate estate and restraint upon anticipation. These developments, which appear to have had little impact in Canada, enabled the propertied classes in England to keep the family property intact by preserving it from falling into a daughter's

husband's hands.

The Married Women's Property Acts of the 19th century whittled away at the concept of unity of legal personality. In part, they gave wives the right to acquire and hold property. They established a separate property regime under which marriage created no property rights apart from the inchoate rights of dower and curtesy and the contingent rights created by the law of succession. In brief, a husband and wife were to be treated as strangers for the purpose of determining the ownership of property.

The system of separate property often resulted in hardship when the marriage ended. The traditional roles assumed by marriage partners ensured that the property was usually paid for by the husband and taken in his name. In such a situation, it belonged to him absolutely. While the economic inequality might not present a fundamental problem during the existence of a harmonious relationship, it meant that a wife frequently had no property on marriage breakdown.

Prior to the passage of family property law reforms, the courts had various tools available to mitigate the harshness of the separate property regime. One of these was an old rule called the presumption of advancement whereby the law presumed that a husband who paid for property taken in his wife's name or who transferred property into his wife's name intended to make a gift to her of the property. This presumption was rebuttable. Nevertheless, it was a useful device whereby a wife could claim legal and equitable title to property in her name regardless of the financial contributions to its acquisition. The presumption of advancement could also be sued to buttress the presumption that the beneficial interests followed the legal estate in those situations where the property was taken in the names of both spouses and the husband provided the purchase

price. The effect of the presumption of advancement in this situation should not be exaggerated. Canadian courts have generally given great weight to the paper title if title is held jointly. In Kearney v. Kearney, [1970] 2 O.R. 152, 10 D.L.R. (3d) 138 (C.A.), the wife was the sole contributor to the purchase price of a home held jointly by the spouses. The court found that the beneficial ownership was also held jointly, even though the presumption of advancement never applied when a wife made the financial contributions.

Neither the presumption of advancement nor the presumption that the beneficial interest follows the legal interest could be used to assist a wife where the title to the property was taken in the husband's name alone. It was in this situation that the concept of separate property worked the greatest hardship. For a short time, some judges attempted to find in s. 12 of the Married Women's Property Act, R.S.O. 1970, c. 262 [repealed S.O. 1978, c. 2, s. 82], a broad, discretionary power to adjust existing property rights between spouses. Development of this approach - frequently labelled "Palm-tree justice" - was effectively precluded by the Supreme Court of Canada in Thompson v. Thompson, [1961] S.C.R. 3, 26 D.L.R. (2d) 1. Thereafter, the only means of recognizing the contribution of a non-titled spouse to the acquisition of property was through the use of trust concepts - in particular, the resulting and constructive trusts...

Although the constructive trust analysis might have effectively eliminated the harshness of the separate property regime on marriage breakdown it developed too late to stem the tide of legislative reform". (from Hovius, Family Law)

And it is these reforms, then, that are reflected in the Ontario Family Law Act, 1986 and the P.E.I. Family Law Reform Act, 1978. There are,

however, differences among the various approaches to reform, and these should be considered.

(III) FAMILY LAW PARADIGMS:

The three basic paradigms that govern property rights vested in spouses can be summarized as follows:

(1) a regime of separate property and judicial discretion where division of that property becomes necessary;
(2) a community of property regime where matrimonial property (property acquired during the marriage) may be dealt with by either spouse during the marriage but is disposed of in a manner similar to the separate property schemes. Community of property is a product of civil code systems;
(3) a regime of separate property where property is accounted for and divided in a more "mechanical" way upon marriage breakdown. There is less judicial discretion here than with (1) above.

Payne, in "Family Property Reform As Perceived by the Law Reform Commission of Canada" (1976), 24 Chitty's L.J. 289 at 294-298 (as found in Hovius, Family Law, supra) discusses these three basic paradigms more fully, illuminating some of their strengths and weaknesses:

(i) THE FIRST APPROACH: SEPARATION OF PROPERTY WITH A DISCRETION IN THE COURT

This discretionary approach presupposes that the law of separate property would be retained, so that ownership of property would follow the legal title or belong to the spouse who paid for the property. On termination or breakdown of the marriage, however, the court would exercise broad powers to transfer property from one spouse to the other or to settle property for the benefit of the children.

The Law Reform Commission of Canada identified potential disadvantages that would flow from the application of a discretionary regime. The first is lack of certainty or predictability. Many of the factors that must be taken into account in the exercise of discretion are highly subjective, and judges may differ in their evaluations of particular factors. This can have particular significance where misconduct is designated as a relevant factor to be taken into account by the court. A second drawback of the discretionary system flows from the lack of fixed legal rights. Since property is frequently held in the name of the husband, a discretionary regime tends to project the image of the married woman going "cap in hand" to the court in order to obtain what is "rightfully hers". A discretionary regime cannot offer the psychological advantage that accrues to a person who knows that he or she has a positive right that is guaranteed and protected by law.

Furthermore, the absence of fixed rights and the need to have recourse to the courts to ensure a fair and equitable distribution of the property in the event that the spouses cannot agree, necessitates expensive litigation. And the burden of litigating will usually fall most heavily on the married woman, who may have few assets to sustain any protracted litigation.

Counterbalancing these disadvantages is the fact that a discretionary property regime would be relatively easy to implement. It would not require any substantial modification in the economic management of the household by married persons in the community. It would also provide a flexible means of accommodating the interests of the spouses. Such flexibility was viewed by the Law Reform Commission as being of importance not as a means for encouraging the courts to depart from approximate equal sharing, but rather as a device to allow the courts to deal fairly with the difficult problems that can arise in the reorganization of any family's economic structure.

The adoption of a discretionary regime could also more easily accommodate adequate provisions for the children than any system of fixed rules. It was the view of the Law Reform Commission of Canada that any property sharing regime should make it possible for the court to make any appropriate settlement or disposition for the benefit of a child of the marriage. It would be exceedingly difficult to devise a legislative formula that would protect the interests of the children if the formula did not involve a larger measure of judicial discretion.

Finally, a discretionary regime would not need to contain any complex rules regulating the classification of property as shareable or non-shareable. The court would be free to examine the entire economic picture of the family and would not be confined, for example, to dealing solely with assets acquired during the marriage. A discretionary system would leave it open to the courts to determine what property should be shared in order to ensure economic justice for all members of the family having regard to the needs of the particular case.

[Note: This legislation is typified by the 1970 English Matrimonial Proceedings and Property Act, and by British Columbia, Northwest Territories and Saskatchewan "generally on the way to further reform" notes Holland in "Reform of Matrimonial Property Law in Ontario" (1978), 1 Can J.Fam. Law1 at 9-12, as found in Hovius, Family Law, supra]

(ii) THE SECOND APPROACH: COMMUNITY OF PROPERTY

The community of property approach is premised on the assumption that the marriage, among other things, is an economic partnership. As such, the partnership or community owns the respective talents and efforts of each of the spouses. Whatever is acquired as a result of

their talents and efforts is shared by and belongs to both of them equally.

The essence of a community regime is that the earnings and property acquired by the efforts of either spouse become community property in which each spouse has a present legal interest. In the event of death or dissolution of the marriage, the community property, after payment of community debts, is divided equally between the spouses. In those countries that have adopted a community regime, rather complex rules have been devised to regulate property interest. Almost all community regimes recognize three different kinds of property: the separate property of the husband, the separate property of the wife, and community property. Typically, any property owned by either spouse before marriage or acquired by either spouse by way of gift or inheritance during the marriage is treated as the separate property of that spouse. This property is not shared on the termination of the community but is retained by the owner-spouse. All other property, however acquired, becomes community property, in which each spouse has a present interest as soon as it is acquired and an equal share in its value in the event of the termination of the marriage.

Quite frequently, all property owned by either spouse is presumed in law to be community property unless it can be proved to be separate property. Accoordingly, if the spouses do not maintain adequate records of the source of funds used to acquire property, problems of tracing or of commingling will inevitably ensue. Community property regimes, however, are premised on the assumption that commingling is not what most people desire. Consequently, they usually contain elaborate rules and formulae so that distinctions can be made between the husband's property, the wife's separate property, and the community property. These rules and formulae tend to make the essentially simple concept of community of property a rather complicated system in practice.

It has been necessary, for example, to define rules to regulate the extent if any, to which community property is liable for the discharge of contractual obligations entered into by either spouse. Similarly other rules define the extent to which the community benefits or is liable with respect to torts committed upon or by either spouse. A wide diversity of solutions governing contractual and tortious rights and liabilities are to be found even in the eight American states that have a community regime.

Differences also exist with respect to the management powers vested in the spouses. Traditionally the husband has been the sole administrator of community property, but the last decade has seen the introduction of new legislation establishing joint management powers in the husband and wife. It is premature to conclude whether such equalization of the powers of the spouses has spawned many problems. In all probability, it has had no radical effect upon the actual day-to-day management of household or business affairs, but has implications for the businessman or the professional are far from precise...

PROS AND CONS

A community property regime, particularly one that affords equal rights to the wife in the management of the common assets, has a lot to be said for it. It is a system that recognizes the differing contributions of both spouses and allocates, by operation of law, their property rights as the financial and economic fortunes of the marriage progress. It presumably has psychological advantages as well, in that it substantiates the feelings of the home-making wife that she makes a substantial contribution too, and has a legitimate economic stake in, the marriage. It cannot be doubted, however, that the system may produce serious problems.

Since the spouses may own three distinct kinds of property, namely the separate property of the husband, the separate property of the wife, and community property, complexities of identification, tracting and commingling are immediately apparent. Furthermore, since difference consequences may arise out of the dealings with third parties, whether contractual or tortious, problems may be created either for one or other of the spouses or for third parties. While these problems are by no means insurmountable, and have been solved in a number of different ways, they have to be taken into account in considering the desirability of adopting the system.

Furthermore, whether the system is to be introduced on a state-wide or province-wide basis rather than on a national basis, additional problems can arise when spouses move from a state or province with a community property regime to one with a separate property regime, or vice versa. Although rules have been or are being devised to resolve these problems, they add to the complexities.

The situation must, therefore, be carefully thought out before any decision is made to adopt a community property system in a jurisdiction which previously did not have it. Here, it is relevant to point out that all eight of the community property jurisdictions in the United States have had community regimes since statehood. Several other states adopted community property systems in the 1940's in order to secure certain advantages under federal tax laws, but these systems were abandoned when the federal tax laws were changed so as to remove the advantage formerly available in the community property states.

In the final analysis, a choice between a community property system and a deferred sharing regime or a discretionary regime involves complex policy decisions. It may be true that a commmunity property system offers increased protection to the spouses in their common ownership, particularly to the spouse who is not gainfully employed

outside the home and it provides emotional or psychological benefits derived from the feeling of present ownership. These advantages may, however, be set off by the disadvantages of new and complex rules, to be learned not only by the spouses but also by those dealing with them. The choice is not an easy one to make and cannot be undertaken lightly.

In the words of a judge of the Supreme Court of Louisiana:

> "[A] community property regime does not merely create a method by which married persons regulate their affairs during the marriage; it regulates inheritance rights, creditors' rights, testamentary rights, contractual rights, and judicial rights".

A community property regime also has significant implications for the law and policy respecting income tax, gift tax and estate tax, insolvency and bankruptcy, and insurance and pensions. A community property regime also affects and must regulate inter-spousal torts, contracts and gifts. Apart from the psychological benefits deriving from a community property regime, the potential advantages of such a regime may not be sufficiently substantial to warrant fundamental changes in so many areas of the law. One must also recognize the difficulties that would be encountered by the courts in their interpretation of statutory provisions establishing a community regime without the benefit of an established theory of community property. This would undoubtedly present special difficulties in the common law provinces of Canada which have consistently adhered to a separate property regime.

It must be recognized, however, that the adoption of a deferred sharing regime would itself raise similar problems and call for many fundamental and complex adjustments in other areas of the law. Indeed, if simplicity and ease of implementation were the decisive

criteria for introducing statutory reforms, the discretionary approach is far superior to both the deferred sharing and the community regimes.

(iii) THE THIRD APPROACH: DEFERRED SHARING

Deferred sharing is based on the idea that there should be separate ownership of property during marriage, and an equal distribution of property on divorce. Deferred sharing, therefore, lies somewhere between the extremes of separate property on the one hand and full community of property on the other. Deferred sharing regimes exist in Denmark, Sweden, Norway, Finland, West Germany and Holland. In Canada, Quebec adopted a deferred sharing regime in 1970 - the "partnership of acquests" - as its basic family property law, applicable to all married persons who did not make a positive choice of community property or separate property. In addition, the Ontario Law Reform Commission, in the spring of 1974, made a formal and detailed proposal to the government of that province that legislation be enacted to create a deferred sharing system, known as the "matrimonial property regime", to replace many fundamental aspects of the law of separate property in Ontario. Although there are some conceptual differences, its results are essentially similar to Quebec's partnership of acquests.

The basic theory of the deferred sharing system is simple. In general terms, all property acquired by either spouse during marriage is to be shared equally when the marriage partnership is dissolved. There are some exceptions to this rule dealt with below. In describing how a sharing plan would operate, the model of deferred sharing developed by the Ontario Law Reform Commission, will be used.

Deferred sharing is primarily designed to operate when the marital relationship has deteriorated to the point that the spouses must stand

upon their legal rights rather than upon economic arrangements made on the basis of mutual trust and respect. Until this point is reached, both spouses, under the deferred sharing system, are separate as to property. Each is free, with some exceptions designed to protect the interests of the other, to own, buy, sell, and otherwise deal with his or her property as he or she sees fit. However, when a divorce or any other situation arises under which the property regimes would be terminated, both are entitled to an equal share in the economic gains of the marriage, without regard to who paid for any particular asset.

The basic complexity of a deferred sharing system lies in the formula for determining the "total financial product of the marriage". The Ontario formula requires an assessment of the value of the property owned by each spouse at the time of the division of assets. Each then subtracts current debts, the value of property owned before that marriage, and the value of property acquired during the marriage by inheritance or gift from a third party. What is left is the net value of the property that each spouse acquired during the marriage. The husband's net gains are added to those of the wife, and each is entitled to one-half of the total. In practical terms, this means that the spouse with the larger net gain during the marriage will pay an "equalizing claim" to the spouse with the smaller net gain, thereby equalizing the financial position of each.

A key proposal in the Ontario system is that all capital gains to and income from property the value of which is deductible (for example, property owned before marriage) become shareable. On the other hand, any diminution in the value of deductible property would be the amount of the deduction. This avoids most of the tracing of funds and property that creates such complexity under a community property regime. Some record-keeping would still be required, since a spouse would have to show that the value of deductible property had been preserved in order to subtract that amount from his or her net worth

at the time of sharing. Generally speaking, however, the Ontario deferred sharing proposal is much simpler in this respect than a community property system.

The debts and tort liabilities of each spouse would continue to be the separate responsibility of the married person incurring the debt or committing the tort. This represents no legal change affecting third party creditors, who would be in the same position under the Ontario deferred sharing regime as they are now. The impact upon the economic picture in the province would be further minimized by a recommendation to the effect that a spouse's creditors rank ahead of an equalizing claim. Tradesmen, retailers and others dealing with married people would therefore incur no greater risk of non-payment under the Ontario deferred sharing system than they now do under the law of separate property.

A deferred sharing system has ramifications in other areas besides property rights between husband and wife. A province adopting such a system would need to re-examine among other things, some aspects of the laws respecting insurance, pensions, distribution of estates upon intestacy, inter-spousal maintenance, maintenance of children and conflicts of laws. Federal action, particularly in the area of taxation, would also be required. The impact, however, of a deferred sharing system upon the commercial laws and practices that now exist under the law of separate property, and upon most other community customs and usages, would be in no way comparable to the re-ordering that would be required by the adoption of a community of property regime. In addition, because the spouses would be separate as to property until a divorce or the regime was otherwise terminated, neither married persons nor those dealing with them would be required to master any substantial new body of doctrine and rules in order to function successfully under the new regime.

Although it is difficult to forecast such matters with any high degree of accuracy, a deferred sharing system would probably create less litigation than the other approaches discussed.

It is not, however, without its problems. One of the most significant ones is the difficulty that can be encountered in effecting a valuation of property holdings. While houses and chattels can be readily appraised, valuation becomes more problematic when one seeks to assess the value of an insurance policy, a pension plan, a copyright or trademark, or the goodwill of a business. Deferred sharing schemes may also present special problems respecting the sharing of windfalls or assets such as damages awarded to a spouse for a tortious act committed by a third party. I suppose it is safe to assume that damages arising from inter-spousal torts would fall outside the scope of a deferred sharing scheme.

[Note: This scheme is place in Denmark, Sweden, Norway, Finland, West Germany, and Holland. Quebec's "partnership of acquests" is a similar scheme. The current Ontario FLA combines this scheme with judicial discretion.] Hovius explains the application and evolution of these ideas in the Ontario legislation:

(iii) **THE FAMILY LAW REFORM ACT, 1978** [Note: This refers to the 1978 Ontario legislation]

The 1978 Act featured deferred sharing of some assets coupled with considerable judicial discretion. It provided for the general retention of separate property during the marriage coupled with the division of family assets and, in certain circumstances, non-family assets on marriage breakdown. The norm for the division of family assets was that of equal division, although there was authority to divide these assets unequally (s. 4(1) and s. 4(4)). Non-family

assets were divided only in limited circumstances set out in s. 4(6) and s. 8 of the Act.

Family assets were defined in s. 3(b) to include the matrimonial home and all other assets "ordinarily used or enjoyed by both spouses or one or more of their children while the spouses are residing together for shelter or transportation, or for household, educational, recreational, social or aesthetic purposes". The courts held that casual or occasional use for the purposes listed was not sufficient, but that the use had to be "in the course of the customary mode of life of the person concerned": Taylor v. Taylor (1978), 6 R.F.L. (2d) 341 at 353 (Ont. U.F.C.). Nor was an intention to use the asset for the purposes listed sufficient to render it a family asset. Thus, a pension or funds in an R.R.S.P. were not family assets: Leatherdale v. Leatherdale, 30 R.F.L. (2d) 225, [1982] 2 S.C.R. 743. This result was viewed by some as a major flaw in the scheme for property division in the Act (see "A Brief to the Attorney-General of Ontario Respecting the Family Law Reform Act"; Ontario Status of Women Council, 1983, at 13).

On marriage breakdown a spouse could bring an application for a division of family assets: s. 4(1). As noted earlier, this section specified that the spouses were then prima facie entitled to have the family assets divided equally. Under s. 4(4) a court could order an unequal division where an equal division was inequitable having regard to the factors listed.

A division of non-family assets could be made under s. 4(6) or s. 8 of the Act. An application could be made under s. 8 by a spouse or former spouse at any time except after the death of a spouse. A claim by one spouse or former spouse under s.8 had to be based on a contribution of "work, money or money's worth in respect of the acquisition, management, maintenance, operation or improvement of

property, other than family assets, in which the other has or had an interest". Initially, the courts took the view that the contribution required to trigger s. 8 had to be directly related to the property in issue and that such a contribution had to be substantial. See, for example, Silverstein v. Silverstein (1978), 20 O.R. (2d) 185 (H.C.); Meszaros v. Meszaros (1978), 22 O.R. (2d) 695 (H.C.); McIntyre v. McIntyre (1979), 9 R.F.L. (2d) 332 (Ont. H.C.); and Boydell v. Boydell (1978), 2. R.F.L. (2d) 121 (Ont. U.F.C.). However, in Leatherdale, above, the Supreme Court of Canada held that this approach was too restrictive. It held that a wife made a s. 8 contribution to the acquisition of non-family assets by the husband where she contributed to the family expenses thereby freeing upon some of her husband's income to acquire non-family assets. The court also held, however, that the wife's work in the home did not qualify as a s. 8 contribution.

Section 4(6) required the court to make a division of non-family assets in two situations. The first involved the unreasonable impoverishment of family assets by the other spouse. The second was where the result of the division of the family assets was inequitable having regard to the factors set out in s. 4(4) and "the effect of the assumption by one spouse of any of the responsibilities set out in the subsection 5 on the ability of the other property that is not a family asset". The responsibilities listed in s. 4(5) were "child care, household management and financial provision".

The second situation referred to in s. 4(6) caused the courts considerable difficulty. Some of the cases such as Bregman v. Bregman (1978), 7 R.F.L. (2d) 201, 21 O.R. (2d) 722 (H.C.) indicated that there should be a division of non-family assets or an unequal division of family assets to rectify the inequity whenever there was a great disparity between the assets accumulated by the spouses and the non-owning spouse had contributed to the responsibilities listed in s.

4(5). .See also Colville-Reeves v. Colville-Reeves (1982), 27 R.F.L. (2d) 337, 37 O.R. (2d) 568 (C.A.). Other cases such as Re Young and Young (1981), 21 R.F.L. (2d) 388, 32 O.R. (2d) 19 (C.A.) seemed to reject this approach. In Leatherdale v. Leatherdale, above, the Supreme Court of Canada indicated that there should be a division of non-family assets where the non-owning spouse had assumed a greater share of the family responsibilitie listed in s. 4(5). However, the court did not clarify whether a share of non-family assets should be awarded where there was a great disparity in the value of assets accumulated by the spouses and the division of family responsibilities could only be characterized as "normal" or "equal".

Some of the perceived problems with Part I of the Family Law Reform Act, 1978 can now be identified. Entitlement varied depending on the nature of the assets accumulated by the spouses. It seemed odd that the entitlement of the non-owning spouse depended to a large extent on the use made of an asset. Secondly, the Act did not distinguish between property acquired before or after the marriage. If property entitlement is based on the concept that marriage involves a partnership in which each spouse contributes, then only property acquired after marriage should be subject to division. Thirdly, the Act provided for considerable judicial discretion. Judges were authorized to divide family assets unequally and to divide non-family assets in accordance with their views of equity or fairness. The guidelines provided by the legislation for the exercise of discretion were generally vague and unhelpful. Fourthly, the fact that there was no prima facie entitlement to a share of the other spouse's pension caused great concern since this is often the major asset held by a working spouse. Finally Part I did not apply on death. This meant that a spouse whose marriage broke down could be in a more advantageous position than a spouse whose marriage ended with the death of the other spouse.

(3) THE FAMILY LAW ACT, 1986

By the mid 1980's there was general agreement that the property regime established under the 1978 Ontario Act was in need of reform. There was, however, disagreement over the nature of the reform required. Some individuals and groups favoured limited reforms, such as the inclusion of pensions in the pool of family assets and the extension of the regime to marriages ended by the death of a spouse. Others wanted more fundamental change. In the end, the later view prevailed. On March 1, 1986 the Family Law Act, 1986 came into force. Part I of the Act introduced a modified version of the regime proposed by the Ontario Law Reform Commission in 1974.... Deferred sharing of the economic gain achieved by both spouses during the cohabitation under the marriage is now the norm in Ontario". [from Hovius, Family Law, supra].

(IV) CONCEPTUAL DIFFERENCES BETWEEN FLA AND FLRA LEGISLATION

Though both the Ontario Family Law Act, 1986 and P.E.I.'s Family Law Reform Act, 1978, are attempts to reform family law it should be noted that they differ in important ways, notably in their conception of family property. A summary of differences is provided in James C. MacDonald et al. Law And Practice Under The Family Law Act Of Ontario, Rev. Ed. Vol. 1:

Family Law Act (Ontario)

(1) A spouse's entitlement to a division of property arises on separation, divorce, annulment, improvident depletion of assets, or death.

(2) Division of property is according to value resulting in the computation of an equalizing payment.

(3) The division includes the matrimonial home and all property acquired during the period between the date of marriage and the date

of entitlement, except excluded property, and all increases in value during this period accuring to property acquired before the marriage.

(4) As a general rule, the equalizing payment is one-half the difference between the respective net family properties of the spouses.

(5) Whether property is included in a spouse's net family property depends on ownership.

(6) Net family property is the value of the spouse's non-excluded property owned at entitlement date less;

(a) debts and liabilities at entitlement date; and

(b) net value of property (net after deduction of debts) owned at date of marriage except for the matrimonial home which, if acquired before marriage, is still included in a spouse's net family property.

(7) Date of valuation of current property is date of entitlement.

(8) Excluded property consists of property, other than a matrimonial home, acquired by third party gifts or inheritance after the marriage, and the income produced (if expressly excluded by the donor or the testator); damages for personal injuries; proceeds of life insurance, substitute property into which any of the property mentioned so far can be traced; and property excluded by a domestic contract.

(9) Equalization payment may be varied if equalization of net family properties would be "unconscionable" having regard to certain statutory criteria.

(10) The criteria referred to are: the failure to disclose debts existing at the time of marriage; incurring debts recklessly or in bad faith; acquiring property through gifts from the other spouse; intentional or reckless depletion of property; realizing an equalization payment that would be disproportionately large in relation to a period of cohabitation that is less than five years; incurring disproportionately large amounts of debts for support of family; having a written agreement that is not a domestic contract; and any other property circumstance.

Family Law Reform Act [P.E.I.]

(1) Entitlement arises on separation, divorce, and annulment only.

(2) Division of the property itself.

(3) Confined to family assets only, unless it would be inequitable and then includes part of, or all non-family assets.

(4) As general rule, the assets are divided equally with non division of non-family assets.

(5) Whether property is included in family assets depends on use.

(6) Debts not related to the family assets are not deducted (eg. unpaid income tax).

(7) Date of valuation of current value is date of trial.

(8) No property excluded which otherwise comes within the definition of family assets."

(from MacDonald, et al. Law and Practice, supra)

Background Materials

(V) SELECTED FEATURES OF BASIC FAMILY LAW PARADIGMS (SUMMARIZED & COMPARED)

(i) Philosophy/Application of family law legislation:

(1) Separate property with judical discretion (P.E.I. Family Law Reform Act):
- no specific philosophy enuciated; entitlement arises upon annulment, separation and divorce (ss.) also see Family Law Reform Act, ss. 3, 12, 49, 59.

(2) Separate Property with deferred sharing (Ont. Family Law Act):
- Family Law Act exists to "encourage and strengthen the role of the family", and states that "marriage is a form of partnership". And a spouse's entitlement arises on separation, divorce, annulment, improvident depletion of assets, or death. See Family Law Act ss. 2, 16, 28, 60, 70.

(3) Partnership of Acquests (Quebec Civil Code of Quebec):
- Civil Code of Quebec sees marriage as a partnership; Art. 441 states "the spouses have indentical rights and obligations in marriage".

(ii) Division of assets; statement of assets:

(1) Separate property with judicial discretion (P.E.I. Family Law Reform Act):
- where an application for division of assets is made, parties must file a statement of assets (see Family Law Reform Act, s. 6).

(2) Separate property with deferred sharing (Ont. Family Law Act):
- statement of property must include debts and liabilities, and all deductions under definition of "net family property". (FLA s. 8)

- court may require a spouse to furnish financial information (s. 9(2)).

(3) Community of property (Quebec Civil Code of Quebec):
- Art. 516 provides that if the parties do not agree on the valuation of property, it will be evaluated by experts.

(iii) **Assets subject to division:**

(1) Separate property with judicial discretion (P.E.I. Family Law Reform Act):
- "family assets" are divided according to "ordinary use" test; property may be excluded by a domestic contract. (see Family Law Reform Act, s. 4).

(2) Separate property with deferred sharing (Ont. Family Law Act):
- "net family property" is all property that a spouse owns on the "valuation date" (a defined term) except property exempted by s. 4(2), which includes: gift or inheritance; income from gift or inheritance; damages for personal injury, etc.; life insurance proceeds; property agreed to in domestic contract.

(3) Partnership of Acquests (Quebec Civil Code of Quebec):
- Art. 482 declares that the only spousal private property consists of: property owned or possessed when regime comes into effect (i.e. at marriage); property acquired through succession or gift; property acquired to replace private property; retirement pension; personal clothing; instruments of profession.

(iv) **Conditions necessary for division and type of division:**

(1) Separate property with judicial discretion (P.E.I. Family Law Reform Act):
- s. 5 states where a decree nisi of divorce is pronounced; a marriage is declared a nullity; or where spouses are separated, either spouse may apply to have family assets divided into equal shares.

(2) Separate property with deferred sharing (Ont. Family Law Act):
- s. 5(1) where divorce is granted or a marriage is declared a nullity, or where there is separation and no reasonable prospect of resumed cohabitation, the spouse whose net family property is the lesser of the two net family properties is entitled to one-half the difference between them.

(3) Partnership of Acquests (Quebec Civil Code of Quebec):
- Art. 497 states that the partnership of acquests is dissolved by: death of a spouse; divorce (or separation as to bed and board or property); absence of spouse (according to law); nullity. Art. 499 provides that "each spouse retains his private property after the regime is dissolved", though, "he may accept or renounce the partition of his spouse's acquests, notwithstanding any agreement to the contrary".

(v) **Factors affecting unequal division of family property:**

(1) Separate property with judicial discretion (P.E.I. Family Law Reform Act):
- Subject to s. 5(5) which allows the court to vary distribution with regard to agreements other than domestic contracts; length of marriage; length of separation; date property was acquired; property acquired by inheritance or gift; any other circumstance. 5(7) says

the rationale for this section is to recognize "mutual contribution of the spouses, whether financial or otherwise, to the family welfare..."

(2) Separate property with deferred sharing (Ont. Family Law Act):
- s. 5(6) provides that a court may vary the equalization called for by s. 5(1) "If...equalizing the net family properties would be unconscionable, having regard to "a spouse's failure to disclose debts or liabilities to the other spouse; debts incurred recklessly; gifts; reckless depletion of property; a disproportionately large equalization payment where marriage is for less than five years; a written agreement; any other circumstance regarding property.

(3) Partnership of Acquests (Quebec Civil Code of Quebec):
- Art. 520 provides that "property over which neither spouse is able to establish his exclusive right of ownership is presumed to be held by both in undivided ownership, one-half by each."

(vi) Exclusion of property from division of assets:

(1) Separate property with judicial discretion (P.E.I. Family Law Reform Act):
- where a s. 5 application is made, and a party wishes to show that property is not a "family asset", the onus of proof is, by s. 6(2), on that party.

(2) Separate property with deferred sharing (Ont. Family Law Act):
- s. 4(3) of the Family Law Act requires that the individual seeking to have property deducted from the net family property calculation bears the onus of proving the deduction.

(3) Partnership of Acquests (Quebec Civil Code of Quebec):
- Art. 491 states that the Code presumes that all property is "presumed to constitute an acquest" unless it is established to be private property, and Art. 492 provides that if a spouse is unable to show that property is private, it is held by both spouses.

(vii) **Definition of Matrimonial Home:**

(1) Separate property with judicial discretion (P.E.I. Family Law Reform Act):
- s. 39 of the Family Law Reform Act deems a matrimonial home to be "property in which a married person has an interest and that is or has been occupied by the married person and his or her spouse as their family residence..." S. 39(2) permits there to be more than one family home.

(2) Separate property with deferred sharing (Ont. Family Law Act):
- s. 18 Family Law Act deems "every property...that was at the time of separation ordinarily occupied by the person and his or her spouse as their family residence is their matrimonial home".

(3) Partnership of Acquests (Quebec Civil Code of Quebec):
- the Code does not specifically define "matrimonial home", referring instead to the "principal family residence".

(viii) **Designation of Matrimonial Home:**

(1) Separate property with judicial discretion (P.E.I. Family Law Reform Act):
- s. 44 empowers the court to determine whether property is or is not a matrimonial home.

(2) Separate property with deferred sharing (Ont. Family Law Act):
- s. 20(1) of the Family Law Act states that "one or both spouses may designate property owned by one or both of them as a matrimonial home, in the form prescribed by the regulations under this Act". And s. 20(4) adds, "on the registration of a designation made by both spouses, any other property that is a matrimonial home under s. 18 but is not designated by both spouses ceases to be a matrimonial home".

(3) Partnership of Acquests (Quebec Civil Code of Quebec):
- the Code does not specifically define "matrimonial home", referring instead to the "principal family residence".

(ix) **Disposition of Matrimonial Home:**

(1) Separate property with judicial discretion (P.E.I. Family Law Reform Act):
- s. 42 Family Law Reform Act states that no person shall dispose of or encumber any interest in a matrimonial home unless spousal consent is given. S. 44 outlines circumstances in which a court may allow for the disposition or encumbrance of the matrimonial home.

(2) Separate property with deferred sharing (Ont. Family Law Act):
- s. 21 provides that no spouse shall encumber the matrimonial home except in certain prescribed cases. 21(2) allows the court to set aside transactions that contravene 21(1). S. 23 empowers the court to determine if property is a matrimonial home, and to authorize the disposition or encumbrance of it in certain circumstances.

(3) Community of property (Quebec Civil Code of Quebec):
- Art. 454 states that neither spouse may, without the consent of the other, dispose of rights which confer on him the use of the principal family residence.

(x) **Factors considered in possession order:**

(1) Separate property with judicial discretion (P.E.I. Family Law Reform Act):
- s. 45 empowers the court to make an order for possession of the matrimonial home, but according to s. 45(3) "only if in the opinion of the court, other provision for shelter is not adequate in the circumstances or it is in the best interests of a child to do so."

(2) Separate property with deferred sharing (Ont. Family Law Act):
- s. 24 provides that the court may make an order for exclusive possession of the matrimonial home, and in doing this the court should consider: the best interests of the children; existing support orders; financial position of both spouses; written agreements between the parties; availability of other affordable accomodation; any violence committed by one spouse against the other spouse or children.

(3) Partnership of Acquests (Quebec Civil Code of Quebec):
- Art. 457 and Art. 458 of the Code provide for exclusive possession, Art. 458 stating that a court may, "grant the right of use of the principal family residence to the spouse to whom it awards custody of a child".

(VI) **Valuation of family property under the Ontario Family Law Act:**

A key difference between current P.E.I. family law legislation and Ontario legislation is the method by which family property is

determined and valued. This central concept and its accounting consequences is discussed in general terms by James C. MacDonald and Ann Wilton in Law and Practice Under The Family Law Act of Ontario:

"Under the Family Law Act, 1986, S.O. 1986, c. 4 (the "Act"), the net family property ("NFP") of each spouse is determined in order to calculate the equalization payment to the spouse with the lesser net family property. Loosely paraphrased, "net family property" is defined in the Act as:

"(i) the value of all property, except certain excluded property, owned on the valuation date after deducting liabilities at the valuation date; less,

(ii) the value of all property owned, other than a matrimonial home, at the date of marriage less liabilities at the date of marriage."

The key words "property", "liabilities", "valuation date", "excluded property" and "matrimonial home" are further defined in the Act. However, the word "value" is not. Nowhere in the Act is there a discussion of an appropriate basis of property valuation. The Family Law Reform Act, R.S.O. 1980, c. 152, was also conspicuous in its avoidance of a definition of the term "value".

Value is an illusive and subjective concept. Businesspersons and professionals often believe, incorrectly, that the value of a property should be the same, regardless of the purpose for which it is being determined and regardless of the parties to the actual or hypothetical transaction. There are many different kinds of value that may be ascribed to the same property. Each is appropriate in different circumstances. Justice Brandeis of the United States Supreme Court stated in 1923 that value is a word of many meanings.

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"Fair market value" was the generally accepted definition of value for matrimonial law purposes under the Family Law Reform Act, R.S.O. 1980, c. 152 (now repealed in part). Under the present Act, there will be more latitude in the definition of value. The preamble of the Act supports the "orderly and equitable settlement of the affairs of the spouses upon the breakdown of the partnership". This suggests that more than one valuation basis can be used and that, whatever basis is used, such basis ought to be fair and appropriate in light of all the circumstances and not just reflecting the market forces predominating at the date of valuation. In order to select a just and equitable basis, it is important to understand the alternative concepts discussed in this chapter.

"Fair market value" has been the generally accepted definition of value for matrimonial law purposes. It is a well-understood term and a useful tool of measurement in the initial examination of the financial circumstances of parties. However, "fair market value" cannot be as well-tailored to the circumstances as "fair value". The concept of "fair value" will go the rest of the distance of establishing a just and equitable value.

"Fair value" is generally taken to mean the value that is just and equitable in the circumstances. It might mean intrinsic value, value to owner, fair market value without any minority discount or premium for control, or some other amount. To restrict the court's view to fair market value can be woefully misleading in the light of the broad parameters of fairness, the requirement to consider "all the circumstances", the utmost good faith required between partners, and the unique and subjective goals of family law. Quantification of fair value, together with a clear explanation of its meaning and relevance to the matter at hand,

will result in a more sensitive settlement and, it is hoped, one that can more frequently be negotiated out of court....

In a commerical transaction, as opposed to a matrimonial one, there is a lesser obligation on a valuator to be concerned with the reasonableness and appropriateness of the valuation from the "other side's" point-of-view. In a matrimonial matter, however, a valuator must not only act with utmost good faith but must develop a refined sense of what is reasonable for both parties...

The Family Law Act, 1986 follows a North American trend. Many of the concepts contained in the Act were previously incorporated into the law in Canada's western provinces. The Act preserves the concept of separate property ownership during marriage as opposed to the community of property concept. On breakdown of the marital partnership, however, there will be an equal sharing of the increase in net worth of property acquired during the marriage (subject to specified exemptions such as inheritances and the like). There are specified criteria for rebutting the presumption of equal sharing. Property to be valued includes pension benefits and credits, R.R.S.P.'s and similar plans.

In view of the trend toward more extensive property divisions, the mechanics of distribution schemes and the valuation process have become more sensitive, sophisticated and, unfortunately, more complex. Tax, corporate and estate lawyers are turning their minds to creative distribution mechanisms in family matters. Where the property issues are complex and the amounts involved substantial, settlement of a matrimonial matter will involve many of the same legal and accounting skills previously thought only appropriate to corporate reorganizations and estate planning. Over the coming years, techniques will be adapted from those areas

to be specifically applicable to matrimonial matters". (from MacDonald et al., supra).

(VII) **LEGISLATIVE PROVISION FOR DIVISION OF FAMILY PROPERTY: A COMPARISON OF ONTARIO FAMILY LAW ACT AND P.E.I. FAMILY LAW REFORM ACT:**

1. **P.E.I. Family Law Reform Act:** (s. 4 and s. 5)

"Sec. 4. Interpretation. - In this Part

(a) family assets - "family assets" means a matrimonial home as determined under Part III and property owned by one spouse or both spouses and ordinarily used or enjoyed by both spouses or one or more of their children while the spouses are residing together for shelter or transportation or for household, educational, recreational, social or aesthetic purposes, and includes

(i) money in an account with a chartered bank, savings office, credit union or trust company where the account is ordinarily used for shelter or transportation or for household, educational, recreational, social and aesthetic purposes,

(ii) where property owned by a corporation, partnership or trustee would, if it were owned by a spouse, be a family asset, shares in the corporation or an interest in the partnership or trust owned by the spouse having a market value equal to the value of the benefit the spouse has in respect of the property,

(iii) property over which a spouse has, either alone or in conjunction with another person, a power of appointment exercisable in favour of himself or herself, if the property would be a family asset if it were owned by the spouse, and

(iv) property disposed of by a spouse but over which the spouse has either alone or in conjunction with another person, a power to revoke the disposition or a power to consume, invoke or dispose of the property if the property would be a family asset if it were owned by the spouse,

but does not include property that the spouses have agreed by a domestic contract is not to be included in the family assets;

(b) property - "property" means real or personal property or any interest therein.

Sec. 5. Division of family assets - (1) Subject to subsection (3), where a decree nisi of divorce is pronounced or a marriage is declared a nullity or where the spouses are separated and there is no reasonable prospect of the resumption of cohabitation, each spouse is entitled to have the family assets divided in equal shares by value notwithstanding the ownership of the assets by the spouses as determinable for other purposes and notwithstanding any order under section 7.

(2) Application to court - The court may, upon the application of a person who is the spouse of another, determine any matter respecting the division of family assets between them.

(3) Effect of death of spouse - The rights under subsection (1) are personal as between the spouses but any application commenced under subsection (2) before the death of a spouse may be continued by or against the estate of the deceased spouse.

(4) Ante-nuptial property - For the purpose of determining the value of any property which

(a) is a family asset; and

(b) was acquired by either spouse prior to the date of the marriage,

The court shall deduct from the net value of that property at the date of the hearing such sum as the court determines to be the value, at the date of the marriage, of the equity in that property owned by that spouse.

(5) Variation of division - The court may make a division of family assets resulting in shares that are not equal where the court is of the opinion that a division of the family assets in equal shares would be inequitable, having regard to

(a) any agreement other than a domestic contract;

(b) the duration of the period of cohabitation under the marriage;

(c) the duration of the period during which the spouses have lived separate and apart;

(d) the date when the property was acquired;

(e) the extent to which property was acquired by one spouse by inhertiance or by gift; or

(f) any other circumstance relating to the acquisition, disposition, preservation, maintenance, improvement or use of property rendering it inequitable for the division of family assets to be in equal shares.

(6) Property other than family assets - Where in the opinion of the court, a spouse has unreasonably impoverished the family assets or the result of a divison of the family assets would be inequitable in all the circumstances having regard to the considerations set out in clauses 5(a) to (f), the court may make a division of any property that is not a family asset.

(7) Purpose - The purpose of this section is to recognize that inherent in the marital relationship there is mutual contribution by the spouses, whether financial or otherwise, to the family welfare, entitling each spouse to an equal division of the family assets upon termination of the marriage, subject to the equitable considerations set out in subsections (5) and (6).

2. **Ontario Family Law Act**

Sec. 4. Definitions - (1) In this Part,

"court" - "court" means a court as defined in subsection 1(1), but does not include the Provincial Court (Family Division);

"matrimonial home" - "matrimonial home" means a matrimonial home under section 18 and includes property that is a matrimonial home under that section at the valuation date;

"net family property" - "net family property" means the value of all the property, except property described in subsection (2), that a spouse owns on the valuation date, after deducting,

(a) the spouse's debts and other liabilities, and

(b) the value of property, other than a matrimonial home, that the spouse owned on the date of the marriage, after deducting the spouse's debts and other liabilities, calculated as of the date of the marriage;

"property" - "property" means any interest, present or future, vested or contingent, in real or personal property and includes,

(a) property over which a spouse has, alone or in conjunction with another

(2) Excluded property - The value of the following property that a spouse owns on the valuation date does not form part of the spouse's net family property:

1. Property, other than a matrimonial home, that was acquired by gift or inheritance from a third person after the date of the marriage.

2. Income from property referred to in paragraph 1, if the donor or testator has expressly stated that it is to be excluded from the spouse's net family property.

3. Damages or a right to damages for personal injuries, nervous shock, mental distress or loss of guidance, care and companionship, or the part of a settlement that represents those damages.

4. Proceeds or a right to proceeds of a policy of life insurance, as defined in the Insurance Act, that are payable on the death of the life insured.

5. Property, other than a matrimonial home, into which property referred to in paragraphs 1 to 4 can be traced.

6. Property that the spouses have agreed by a domestic contract is not to be included in the spouse's net family property.

(1986, c. 35, s. 1(2))

(3) Onus of proof re deductions and exclusions - The onus of proving a deduction under the definition of "net family property" or an exclusion under subsection (2) is on the person claiming it.

(4) Close of business - When this section requires that a value be calculated as of a given date, it shall be calculated as of close of business that date.

(5) Net family property not to be less than zero - If a spouse's net family property as calculated under subsections (1), (2) and (4) is less than zero, it shall be deemed to be equal to zero.

Sec. 5. Equalization of net family properties - (1) When a divorce is granted or a marriage is declared a nullity, or when the spouses are separated and there is no reasonable prospect that they will resume cohabitation, the spouse whose net family property is the lesser of the two net family properties is entitled to one-half the difference between them.

(2) Idem - When a spouse dies, if the net family property of the deceased spouse exceeds the net family property of the surviving spouse, the surviving spouse is entitled to one-half the difference between them.

(3) Improvident depletion of spouse's net family property - When spouses are cohabitating, if there is a serious danger that one spouse may improvidently deplete his or her net family property, the other spouse may on an application under section 7 have the difference between the net family properties divided as if the spouses were separated and there were no reasonable prospect that they would resume cohabitation.

(4) No further division - After the court has made an order for division based on subsection (3), neither spouse may make a further application under section 7 in respect of their marriage.

(5) Idem - Subsection (4) applies even though the spouses continue to cohabit, unless a domestic contract between the spouses provides otherwise.

(6) Variation of share - The court may award a spouse an amount that is more or less than half the difference between the net family properties if the court is of the opinion that equalizing the net family properties would be unconscionable, having regard to,

(a) a spouse's failure to disclose to the other spouse debts or other liabilities existing at the date of the marriage;

(b) the fact that debts or other liabilities claimed in reduction of a spouse's net family property were incurred recklessly or in bad faith;

(c) the part of a spouse's net family property that consists of gifts made by the other spouse;

(d) a spouse's intentional or reckless depletion of his or her net family property;

(e) the fact that the amount a spouse would otherwise receive under subsection (1), (2) or (3) is disproportionately large in relation

to a period of cohabitation that is less than five years;

(f) the fact that one spouse has incurred a disproportionately larger amount of debts or other liabilities than the other spouse for the support of the family;

(g) a written agreement between the spouses that is not a domestic contract; or

(h) any other circumstance relating to the acquisition, disposition, preservation, maintenance or improvement of property.

(7) Purpose - the purpose of this section is to recognize that child care, household management and financial provision are the joint responsibilities of the spouses and that inherent in the marital relationship there is equal contribution, whether financial or otherwise, by the spouses to the assumption of these responsibilities, entitling each spouse to the equalization of the net family properties, subject only to the equitable considerations set out in subsection (6)."

[The following table is from Matrimonial Property Law in Canada, Eds. Bissett - Johnson and Holland (Toronto:Carswell, 1980)]

TABLE OF CONCORDANCE

(V) (Note: In the Quebec column, the three-digit section numbers refer to the Civil Code of Quebec, and the four-digit numbers refer to the Civil Code of Lower Canada)

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	Alta.	B.C.	Man.	N.B.	Nfld.	N.S.	Ont.	P.E.I.	Que.	Sask.
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Liens and encumbrances				21	11	9	22	43	14,15	
Possession orders	19,21	77,78	6(2)	23,24	13	11	24(1)	45	457, 459	5,13
Possession orders in children's favour					13(2), 13(3)	11(3) -11(5)	24(4)			

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Background materials

	Alta.	B.C.	Man.	N.B.	Nfld.	N.S.	Ont.	P.E.I.	Que.	Sask.
Registration orders	22-24,27, 29			46	15	20(1)	27	48		9-11
Right of possession			6(2)	18	6	6	19	40	451-454, 1352, 1383	4
Variation of orders	19(4)			24	13(4)	11(5)	25	46		8
PRESUMPTION OF ADVANCEMENT ABOLISHED	36			15	29	21		12		50
PROCDURE	4,17,30	8					2	3		44-49, 53-57
REGULATIONS AND RULES	32	73				32	69	69		58,59
SPOUSE-DEFINITION	1(3)	1	1(1)	1	2(e)	2(g)	4(1)	2(f)		2(k)
TAXATION-FACTOR IN UNEQUAL DIVISION	8(k)			9		13(m)				21(2) (g)
TITLE-NOT CONFERRED BY ACT			6(1)	47					43	
TRANSFERS Completed	10	52(3)	6(8), 6(9)	8(a)	9	8(2),11	21(2)	42(2), 44(d)	450-454, 1292, 1297, 1303, 1348, 1364, 1425a,	18(2), 28

Background materials

	Alta.	B.C.	Man.	N.B.	Nfld.	N.S.	Ont.	P.E.I.	Que.	Sask.
									1425f, 1450	
Factor in unequal division	8(h)		6(8), 6(9)	7(f)	20(1)			5(5)(f)	1303-1309, 1364	21(2)(h)
Intended	34	52(3)	21	11	8	8(1)	21	10,42	494, 495, 1292, 1297, 1425a, 1425f, 1450	29

[From Matrimonial Property Law in Canada, Eds. Bissett - Johnson and Holland (Toronto Carswell, 1980)]